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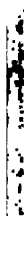
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Ch. Bnt.
Ecclesiastical Courts

AT

Doctors' Commons;

AND IN THE

HIGH COURT OF DELEGATES.

By JOSEPH PHILLIMORE, LL.D.

ADVOCATE IN DOCTORS' COMMONS, CHANCELLOR OF THE DIOCESE OF OXFORD,
AND REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY OF OXFORD.

*Sic unum quidquid paulatim protrahit ætas
In medium, Ralloque in luminis erit oras*

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VOL. I.

CONTAINING CASES FROM HILARY TERM, 1809,
TO HILARY TERM, 1812, INCLUSIVE.

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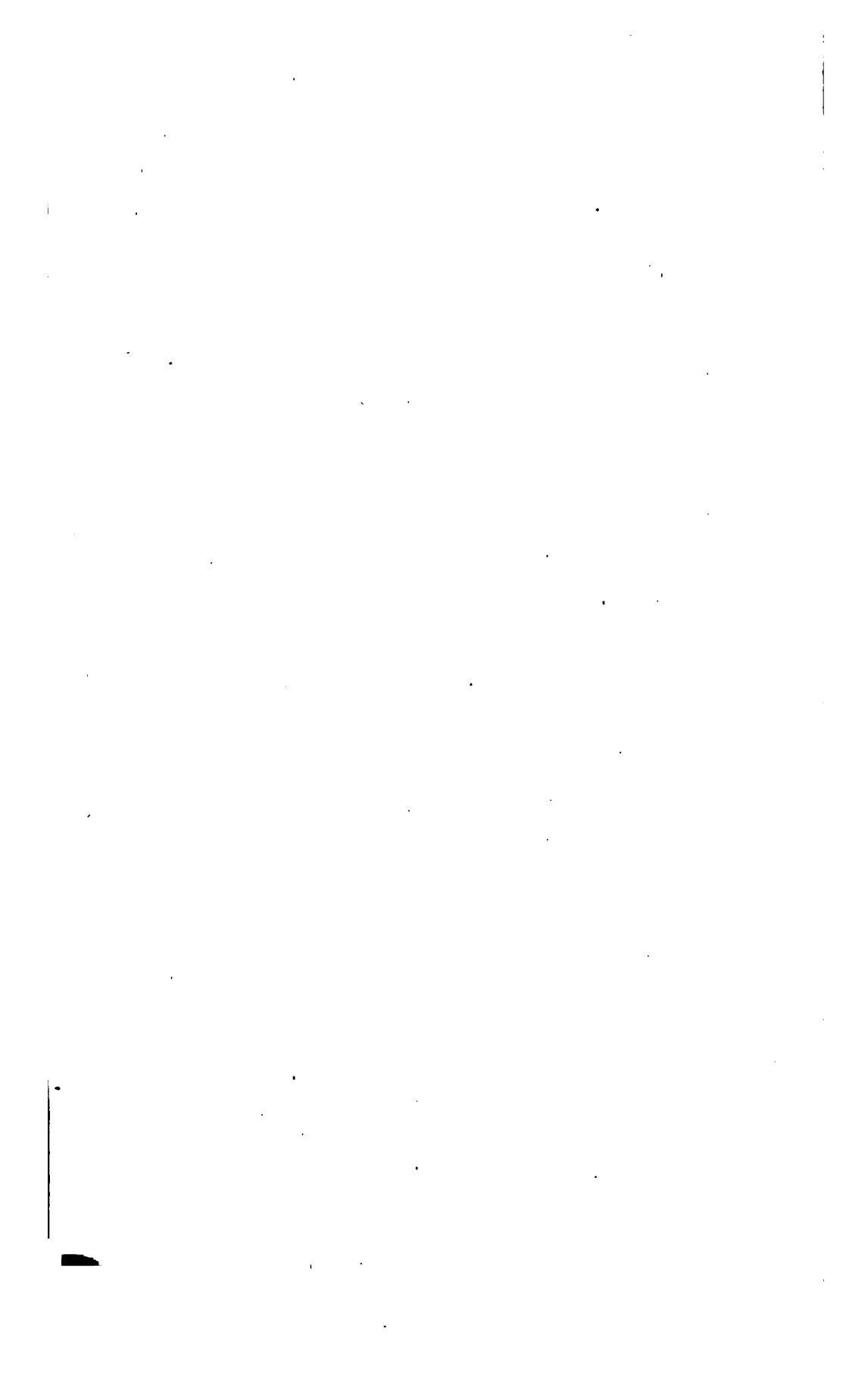
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TO
THE MOST REVEREND FATHER IN GOD
CHARLES,
BY DIVINE PROVIDENCE
LORD ARCHBISHOP OF CANTERBURY,
PRIMATE OF ALL ENGLAND,
AND
METROPOLITAN,
THESE REPORTS
OF CASES ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS AT DOCTORS' COMMONS
AND
THE HIGH COURT OF DELEGATES;
ARE, WITH HIS GRACE'S PERMISSION,
RESPECTFULLY DEDICATED
BY HIS HUMBLE AND OBEDIENT SERVANT,
JOSEPH PHILLIMORE.



ADVERTISEMENT.

THE Editor has to apologise for some inaccuracies which he is fearful will be found to have occurred in this number :—he must rest his apology on the novelty of the undertaking,—and his own inexperience in the work of reporting ;—allowance also will, he trusts, be made for the labor and research he has been obliged to exercise in collecting some of his materials,—and the difficulty he has experienced in digesting and consolidating others of them.

It would be premature, perhaps, before he has completed a volume, to state, even briefly, the motives which have impelled him to the undertaking : he cannot, however, suffer this advertisement to go to the press without distinctly explaining, that, though he has selected Hilary Term, 1809, as the period from which his work shall commence, he has not on that account felt himself precluded from introducing important cases of an earlier date whenever he has thought the opportunity favourable for their insertion, and he has known the notes in his possession to be authentic. In the mode of doing this,

it may be, that he has rather deviated from established usage ; but as no other Reports of the decisions in the Prerogative Court have ever been published, he has considered that he should consult the convenience and advantage of his Readers better by inserting cases of the description above alluded to in the text, and next in succession to those, in the discussion or decision of which their authority has been cited, than by printing them in the smaller type of the notes, or apart from the others in the shape of an Appendix.

Doctors' Commons,
May 28, 1816.

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ERRATA.

- Page 5, line 10, for "endeavours," read *endeavour*.
 — note line 13, for "Valier," read *Vallier*.
 11, — 13, for "concludes," read *concluded*.
 — — 18, for "Valier," read *Vallier*.
 27, line 11, for "Barnaby," read *Burnaby*.
 59, — 4, *dele* "or may be."
 86, — 23, for "is," read *was*.
 93, — 15, *dele* "was."
 94, — 1, for "great," read *greater*.
 133, — 25, for "Barnaby," read *Burnaby*.
 137, note line 9, for "the marriage," read *a marriage*.
 147, — 21, insert semicolon after "the principle,"
 and *dele* comma after "this case."
 153, — 19, insert *and* after "destroyed."
 155, — for "Beauchamp," read *Lord Beauchamp*.
 160, last line for "1757," read "1754."
 162, line 3, insert semicolon after "establishes."
 170, — 15, insert *and intestate* after "bastard."
 175, — 9, insert semicolon after "ill-granted."
 182 last line insert *act on* before "petition."
 185 note line 1, for "700L" read "750L"
 192, line 8, for "is become," read *becomes*.
 209, — 14, for "æquam," read *æquum*.
 221, — 12, for "had," read *have*.
 223, — 2, for "Mr.," read *Mrs.*
 230, — 1, for "Lyttelton," read *Littleton*.
 244, — 22, insert after "person," *Secondly, that the party*.
 276, — 14, after incontinency *dele* "as," and insert *this law also*.
 281, — 1, for "High Court of Delegates," read *Prerogative Court*
 of Canterbury.
 26, *dele* "v."
 309, — 12, }
 313, — 14, } Before Mr. Justice Bayley insert *per Curiam*.
 406, — n. 7, for "their," read *the*.
 412, — 2, for "decisions," read *dicta of the Judges*.
 416, — 26, for "evidence," read *case*.
 501, — in the margin of this and the three following pages for
 "1817," read "1812."
 502, — 9, for "sirname," read *surname*.

REPORTS OF CASES,

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Doctors Commons ;

AND IN THE

HIGH COURT OF DELEGATES.

PREROGATIVE COURT OF CANTERBURY.

THOROLD v. THOROLD.

1809.

*Hilary
Term.*

AN allegation (a) was offered to the Court on the behalf of Miss Thorold, propounding a paper, in the form of a deed of gift, as the last will and testament of her brother, William Thorold, Esq. of Syston Park, in the county of Lincoln.

A paper in the form of a deed of gift, admitted to probate.

(a) According to the practice of the Prerogative Court, the facts intended to be relied upon in support of any contested suit are set forth in a plea, which is termed an allegation; this is submitted to the inspection of the counsel of the adverse party; and if it appears to them objectionable, either in form or substance, they *oppose the admission* of it. If the op-

1809.

*Hilary
Term.*

THOROLD

v.

THOROLD.

The adverse party in the cause was Sir Thomas Thorold, Bart., the father of the deceased.

The paper propounded was, in form and substance, as follows :

“ Be it known to all it may concern, that I, William Thorold, of Syston Park, in the county of Lincoln, *do hereby give* (after my death) to my beloved sister, Jane Thorold, of Syston Park, in the said county of Lincoln, the following estates ; and also, should all, or any parts of these estates, be sold by me during my life, all such monies arising therefrom as shall be placed in the public funds, shall be at her disposal, viz.

“ 1st, My third in the remainder of the unsold Ayton estate, in the county of Durham.

“ 2dly, My moiety in the Husthwaite and Newbald estates, in the county of York.

“ 3dly, My moiety in an estate at Elmley, in the county of York.

“ 4thly, My estate at Barrowby in the county of Lincoln.

“ 5thly, My estate at Carlton, in the county of Lincoln.

“ 6thly, My estate at Holbeach, in the county of Lincoln.

“ 7thly, My house and lands, at Derby.

“ This deed of gift, in my own proper hand-writing, was made, sealed, signed and delivered, to my aforesaid beloved sister, Jane Thorold, spinster, of

position goes to the substance of the allegation, and is held to be well founded, the Court rejects it ; by which mode of proceeding, the suit is terminated without going into any proof of the facts.

" Syston Park, in the county of Lincoln, this 16th
 " day of December, One thousand eight hundred
 " and six,

1809.
Hilary
Term.

" WILLIAM THOROLD.

THOROLD
 v.
 THOROLD.

" In the presence of

" *James Speed,*

" *William Armes,*

" *Henry Parlett.*"

*Arnold and Burnaby, against the admission of
 the allegation.*

It is impossible that this paper can be considered as testamentary, inasmuch as there is neither executor nor residuary legatee named in it, and it purports to be only a deed of gift ;—it contains, indeed, the expression, " I hereby give, after my death," but it is not every paper that disposes of property after death which can be considered as of a testamentary nature. A variety of contracts are not so considered ; settlements, for instance, made in contemplation of marriage, are usually to take place after the death of one of the parties, and have never been considered as testamentary ; and yet they would become so by the same rule, which would impress a testamentary character on an instrument of this description. A paper, therefore, may dispose of property after death, and yet not be entitled to probate. The rule is not universal, but must vary according to the circumstances of each case : and the safest guide for the Court will be the intention of the writer, as evidenced by his own language ;—here he calls the instrument a deed of gift. The difference between

1809.
Hilary
Term.
THOROLD
v.
THOROLD

a testamentary paper and a deed of gift is essential and obvious; the former is ambulatory till the death of the testator, the latter is irrevocable. The one does not require delivery into the hand of the party for whose benefit it is intended, the other does.

In the present case, Mr. *Thorold* gives property to his sister, by an instrument to which he himself, under his own hand, affixes the appellation of a deed of gift, virtually declaring that it was not to operate as a testamentary paper, and he delivered it to his sister in the presence of witnesses. It commences not in the solemn form usually adopted in the inception of testamentary papers, but in the form appropriated to deeds of gift.

Swinburne (b) distinguishes between deeds of gift which are to take place as donations *mortis causâ*, and such as are to operate as legacies; and this, according to his definition, would be *donatio mortis causâ*, over which, this Court could entertain no jurisdiction.

It may be observed also, as a proof that it was not intended to operate as a will, that, as a disposition of the property of the deceased, it is incomplete, it only provides for that portion of it which was to arise from the sale of certain real estates, in his lifetime, and might afterwards be vested in the funds. Of the remainder there is no disposition; —as to that he would die intestate.

(b) Part 1. sec. 7. *Swinburne* has not, perhaps, explained himself on this topic with his usual perspicuity; indeed it has been admitted by his Editor that there is some perplexity in the passage to which allusion is made in the argument: he had obviously in his view when he was writing the several passages on this subject in the Roman law. See Digest, lib. 39. tit. 6. Just. l. 2. tit. 7.

Swabey and Adams in support of the allegation.

In substance the paper is testamentary, and may be so considered without interfering in the least with the general propositions laid down on the other side; indeed, if it is not considered as testamentary, it can have no operation, for it is written on unstamped paper, and consequently, as a deed, would be a mere nullity; and it is a known maxim of law, that if a paper would be ineffectual in one way, endeavours should be used to give it effect in another, "*ut res magis valeat quam pereat*:" independently of these considerations, there are many adjudged cases as to the point at issue.

In *Green v. Proude*, (c) a deed indented passed as a will.

In *Rigden v. Vallier*, (d) a deed by which property was granted among children, was considered

(c) On ejectment on trial at bar, the first question was, whether there was a will or no will? the plaintiff produced a deed, indented, made between two parties, a man and his son; and the father did agree to give the son so much, and the son did agree to pay such and such debts and sums of money; and there were some particular expressions resembling the form of a will, as that he was sick in body, and did give all his goods and chattels, &c. but the writing was both sealed and delivered as a deed; and they gave evidence that he intended it for his will, which the Court said was good proof of his will. See *Green v. Proude*, 1 Mod. 117.

(d) The expressions reported to have fallen from Lord Hardwicke, on this part of the case of *Rigden v. Vallier*, in 2 Vesey, p. 252, are as follows, "another thing is,—that this appears to me to be as near a testamentary act as can possibly be; nor do I know why this cannot be proved as a will in the Ecclesiastical Court, notwithstanding the solemnity of the execution, by sealing and delivery according to the case of *Kibbe v. Lee*; for

1809.

Hilary

Term.

THOROLD

v.

THOROLD.

1809.

Hilar y
*Term.*THOROLD
v.THOROLD.
Prerog. 1790.

to be of a testamentary nature; and in this Court, several papers, styled deeds of gift, have been established as wills; as in *Corp v. Corp*, and in *Johnson v. Johnson*. With respect to the passage from *Swinburne*, it may be answered, that in *Swinburne's* time no testament could be made without an executor: (e) this, however, is rather to be considered as a testamentary schedule, than a testament, the difference between the two being, that one appoints an executor, whereas the other is carried into effect without any such appointment. There is also a marked distinction between an instrument of this sort and a *donatio mortis causâ*, because, in the latter case, if death does not ensue, (f) the gift must be returned.

there was a will sealed and delivered, and in a late case of *Trimmer v. Jackson* in B. R. sent out of this court: he makes use, indeed, of the words 'give, grant and confirm;' but that is not material; and then says, 'after his decease;' so of his personal estate, after his debts and funeral paid; which is plainly a testamentary disposition, his whole personal estate being in his power during his life, and they are in the case of residuary legatees, so that it appears to be in his view, as a testamentary act."

(e) Swinburne says, "The executor is the foundation, the substance, the head, and indeed the true formal cause of the testament, without which a will is no proper testament, and by the which only the will is made a testament."—Swinburne, part 1. sec. 3. p. 14. See also the same Author, part 1. sec. 1. p. 4. and again, sec. 11. p. 83. and Godolphin, O. L. p. 13.

The fact is, the executor was considered as analogous to the heir (*heres*) of the civil law, who was so essential to the will, that if no heir was constituted in the instrument there was an intestacy.

(f) This is clearly the idea the Roman law entertained of this species of donation, "*mortis causâ donatio est quæ prop-*

Arnold, in reply to the cases.

In *Green v. Proude* the deceased described himself as being very sick in body; the instrument, therefore, had all the appearance of being a testamentary act.

In *Rigden v. Vallier*, the bequest being to take effect after payment of funeral expenses, the animus testandi was clearly shewn.

In *Corp v. Corp* the instrument, as a contract, was considered as of no effect in the lifetime of the testator, and a special direction concerning the paper was given to his executors and administrators; added to this being between husband and wife it could not be considered as a deed of gift.

Johnson v. Johnson was different in all its circumstances; the instructions were for a will, but the attorney by mistake drew the paper in the form of a deed.

JUDGMENT.

SIR JOHN NICHOLL,

The sole question arising upon the admissibility of this allegation, is, whether the paper propounded is a testamentary instrument, and proper to be proved as such.

Two grounds of objection may be taken, first,

ter mortis fit suspicionem : eum quis ita donat, ut, si quid humanitus ei contigisset haberet is qui accipit : sin autem super vixisset is, qui donavit, reciperet : vel si eum donationis penituisset, aut prior decesserit is cui donatum sit." Inst. lib. 2. tit. 7. s. 1.

In a subsequent passage the whole doctrine on this head is thus summed up and expounded. "In summâ mortis causâ donatio est, cum magis se quis velit habere, quam eum, cui donet, magisque eum cui donat, quam hæredem suum," and then the framers of the institutes, as if to adorn and illustrate the con-

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that it relates to real property only; secondly, that it declares itself to be a deed of gift, and consequently, cannot be considered as a will.

With respect to the first point, though the property may consist wholly of estates, yet it does not appear to the Court that they may not be estates, disposable as personal property: neither is there any thing to shew that some of these estates may not have been sold during the life of the testator, and then he expressly directs "*that all such monies arising therefrom as shall be vested in the funds shall be at Miss Thorold's disposal*;" these monies, therefore, must fall under the description of personal property.

THIS COURT has always held, that even if it should be *doubtful* (g) whether some part of the

clusions of law at which they had arrived, introduce into their work that remarkable passage from the *Odyssey*, in which Telemachus (in reply to a question put to him by Piræus, whether he would wish the valuable presents he had brought with him from Lacedæmon to be removed to the palace from the place where they had been deposited) thus expresses himself:

Πείραι', οὐ γὰρ τ' ἴδμεν ὅπως ἔσται τὰδε ἔργα
Εἰ κεν ἐμὲ μνηστῆρες ἀγήνορες ἐν μεγάροισι
Λάληθ' κτείναντες πατρίῳ πάντα δάσονται,
'Αὐτὸν ἔχοντα σε βούλομ' ἐπαυρέμεν, ἢ τίνα πῶνδε,
Εἶδε κ' ἐγὼ τούτοισι φόνον καὶ κῆρα φυτεύσω,
Δὴ τότε μοῖ χαίροντι φέρειν πρὸς δῶματα χαίρων.

Hom. *Odys.* lib. 17. l. 79, *et seq.*

(g) In the case of *Durken v. Johnstone by his Guardian*, Prerog. Trin. Term, 1796. Where the question arose on the testamentary schedule of John Durkin, and a considerable degree of uncertainty prevailed as to the nature of the deceased's property. The Court (Sir W. Wynne) said, An objection has been taken that this is a real estate, and not within the jurisdiction of the

property be not freehold, it will grant probate, and for this obvious reason, the probate may be necessary for the purposes of justice, and no evil can arise from the grant of it:—thus, if Miss *Thorold* takes probate of this instrument, and all the estates are real, the probate of this Court can in no way affect them; but if any part should be personal, or if the land should have been sold and the money vested in the funds, for that part the probate ought to pass, supposing the instrument to be in its nature testamentary; besides, it is difficult to imagine why one party should desire probate and the other party object to it, if all the estate is freehold; since, in that case, the probate could have no effect whatever. There appears, therefore, sufficient ground in the present stage of the proceedings to presume, that there may be property to which the probate may be applicable; but at the same time, if it were perfectly clear that there was no such property, the Court would not entertain any question respecting the validity of the instrument.

The main question, however, is, whether the instrument can be considered as testamentary?

In deciding a point of this nature, the Court always looks to the substance, and not to the form of the instrument; to the intention of the writer,

Court, but it is not clear whether it is all real property, or property held only for a term of years; still if the paper *may have any effect* on the estate, I am bound to pronounce for it. This Court is not to judge of the effect; and if it does not appear evidently to be a paper only applying to a freehold estate, it is the duty of this Court to establish it.

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and not to the denomination he affixes to it: it calls itself a deed of gift, but it cannot be valid as such—it is not upon a stamp—it contains no valuable consideration—it might have been revoked during his lifetime, for there is nothing to prevent him from selling the estates; indeed, he expressly looks forward to such an event, for he directs that the monies arising from the sale of them shall be vested in the public funds. This instrument then, cannot, as far as this Court can form any opinion, take effect as a deed of gift: it is not irrevocable, it is only to be consummated by death—not to operate during life; the words are, “I give, after my death:”—death is the event which is to give effect and operation to the instrument. Marriage settlements and contracts are of a totally different nature; they take effect during life.

Many instruments of this kind have been admitted to probate. The case of *Shergold v. Shergold*, (*h*) decided in the Prerogative, is a stronger case than this, because there something of a consideration (*viz.* sixpence) was given.

In *Markwick v. Taylor*, administration with a deed annexed was given (*i*).

(*h*) *Shergold v. Shergold*, Prerog. 1714. Dr. Walter Pope made a deed of gift to Ann Shergold to take effect after his death, and upon delivery of sixpence *gave, granted*, and put her into possession of all his estates,—administration was granted with this deed annexed.

(*i*) *Markwick v. Taylor*, Prerog. 1722. Markwick made a deed of gift of all his estates after death, administration with the deed as a testamentary schedule annexed, was decreed by the Court.

In *Hog v. Lashley*, a Scotch settlement, in the form of a contract, was admitted to probate (*k*).

In *Corp v. Corp*, (*l*) a paper, entitled a deed of gift, was held to operate as a will. That case was argued at great length, and many cases were cited from the common law to shew, that a principle governs all courts to be astute in finding out a mode of giving effect, in one way or another, to an instrument of this sort. They all go on the principle, that the intention of the party is the point to

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(*k*) *Hog v. Lashley*, Prerog. 1789. A Scotch settlement in the form of a contract, but to take place on the death of one of the contracting parties, was pleaded in an allegation as the last will and testament of the party deceased—it was objected that the instrument was not in its nature testamentary—but the objection was over-ruled and the allegation admitted to proof.

(*l*) *Corp v. Corp*, Prerog. 1793. In this case the deed was not to take effect on the death of the writer, but on another contingency, viz. the death of the wife's mother, or the sale of a certain estate—it was entitled "a deed of gift;" the obligatory part was in the following terms, "By this deed I bind myself to give to my wife, either upon the demise of her mother, or the sale of the Yorkshire estate," &c. &c. and it concludes, "I do therefore hereby ordain that my executors, administrators and assigns, consider this deed as the most solemn obligation, in confirmation of which I set my hand and seal." This paper was directed to Mrs. Moore, the wife's mother. The cases cited in argument, were *Rigden v. Valier*, 2 Vesey, 253. *Kittell v. Lee*, Hobart, 312. *Rowe v. Treemain*, 2 W. Wilson, 75. *Goodtill v. Bailey*, Cowper, 375. *Green v. Proude*, 1 Keble, (Mod. 117.) *Wittan v. Wittan*, Chan. Cases, 208. *Johnson v. Johnson*, Prerog. 1780.

The Court said, "that it had been laid down in *Goodtill v. Bailey*, and also in the case in the 2d. *Wilson*, that the instrument, if it cannot operate in one form, may in another, and that it was the duty of the Court to give it effect.

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be looked to, and not the form of the instrument.

In the present case, there is not so much difficulty as there has been in others which have been decided. Nothing could give this instrument operation as a deed of gift; it is expressly a gift to take place upon the testator's death. I have no hesitation therefore in admitting the allegation to proof.

SCOTT v. RHODES.

An unfinished
and unexecuted
paper estab-
lished as a
will.

THOMAS BURCHALL, one of the clerks of the Bank of England, was found dead in his bedroom, on the morning of the 8th of September, 1807, having gone to bed on the preceding evening, apparently in perfect health.

In a box, in which the deceased was in the habit of keeping papers of moment and concern, were found four testamentary writings, of the following import.

(D.) A will, dated August 17, 1793, regularly executed and attested, by which he bequeathed to his wife 2,000*l.* 4 per cents. for life; 1,000*l.* of which are to remain at her disposal, and of the other 1000*l.* 500*l.* to go to Mrs. Whinnell, his wife's sister; 200*l.* to Mrs. Scott, his wife's other sister, or if she died first, to John Scott, her husband, and to their three children 100*l.* each, and appointed Mrs. Whinnell and Mr. Scott executors.

(C.) A will, dated Oct. 5, 1805, regularly exe-

cuted and attested, by which he left all his property to his wife for her life ; at her decease, one half of the property in the funds to be at her own disposal ; the other half to go to her sister Mary Scott, wife of John Scott, her children, and their heirs for ever. John Scott and his son Benjamin to be the executors.

(A.) A paper, in the hand-writing of the deceased, of which the following is a copy :—

“ This is the last will and testament of me, John Burchall, late of Old Gravel Lane, now of King David Lane, in Shadwell, in the county of Middlesex, gent.

“ First, I recommend my soul into the hands of Almighty God, through the merits of my merciful Redeemer, the Lord Jesus Christ ; and as to my worldly goods and estate, I dispose of them as follows :—

“ I first desire my just debts and expenses attending my decease, shall be duly paid ; I then leave to my dear sister Mary Scott, wife of John Scott, (a) of Worship Street, Finsbury, the one half of whatever I may die possessed of in the public funds, and to her heirs for ever. From the other half, it is my wish that one hundred pounds sterling shall be raised, which I leave to Mr. John Scott, as aforesaid ; the residue of my property in the funds, I leave to be equally divided between the three children of the said John and Mary Scott,—John William——Scott, Benjamin Whinnell Scott, and Elizabeth Scott, and to their heirs for

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(a) His wife had died subsequent to the date of C.

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" ever. All the rest, residue and remainder of my  
 " property, whether real or personal, in possession  
 " or reversion, I leave to John Scott, to his heirs for  
 " ever, and I hereby constitute the said John Scott  
 " and Benjamin Whinnell Scott, the executors of  
 " this my last will and testament.

" In witness whereof, I, the said testator, John  
 " Burchall, have hereunto set my hand and seal,  
 " the—— day of August, One thousand eight hun-  
 " dred and seven.

" Signed, sealed, published and declared  
 " by the said testator, John Burchall,  
 " as for his last will and testament, in  
 " the presence of us, who in his pre-  
 " sence, at his request, and in the pre-  
 " sence of each other, have, as here-  
 " unto, set our hands, as witnesses. L. S."

(B.) A paper, in substance of nearly similar import to A. and labouring under precisely the same imperfections in point of form, inasmuch as it was not signed, and, had a clause of attestation, but was not witnessed. This paper was also, throughout, in the hand-writing of the deceased.

(A.) was propounded as containing the last will and testament of the deceased, by Mr. Scott, the executor named in that paper. It was opposed by Ann Rhodes, the cousin-german and one of the next of kin to the deceased, who prayed the Court to pronounce for an intestacy.

In support of paper (A.) several witnesses were examined, who deposed in strong terms, to the



unvarying affection the deceased entertained for Mr. Scott and his family, (who were his wife's nearest relations) and to declarations repeatedly made by him of his intention of bequeathing his property to them.

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To account for the unfinished state of the paper, *Charlotte Milnes*, who lived in the neighbourhood of the deceased, and who used to come every morning to do his household work and return to her own home at night, deposed in substance as follows :

That the deceased had no (*b*) business whatever of his own, but was in the habit of doing any little writing, such as making out bills and writing letters for persons who could not write. That about ten days or a fortnight before his death, she observed him employed in writing that which she supposed to be his will : that he had the whole leaf of the table up, and had several writings on large sheets of paper before him, quite unlike bills or letters : that he desired the defendant to tell Mr. Raffle, (for whom he was in the habit of writing letters,) if he should call, that he the testator was out, and at the same time said, that he was so much taken up with other people's concerns, that he could not do what he had to do for himself ; and seemed rather soured in his temper, and the daughter of Mr. Raffle having accordingly called that afternoon, the deponent told her the testator was not at home.

(*b*) This must be understood with reference to private business, as he was in daily attendance at the Bank, where he transacted business as one of the clerks.

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That the deceased continued writing for some considerable time, for he was extremely slow, and always made a draft of what he wrote, but as she cannot write she is unable to depose with certainty, though she does verily believe that it was in writing his will that he was at such time employed:—

That on the *Monday* next before the *Wednesday* on which *the deceased died*, she again saw him writing, with the same kind of papers before him, and she verily believes that he was then completing his will, but cannot depose with certainty thereto.

That on the night before the deceased died, he being then very well and quite cheerful, told the deponent that he meant to go the next day to Apothecary's Hall, and would make it in his way to call on Mr. Scott, *whom he wished very much to see*.

That the testator died quite suddenly, for he had not been confined by any illness, and on the very day preceding his death he was in good health and spirits, and walked out as usual in the fields towards Whitechapel, and in the evening she left him about half past nine as usual.

She then proceeded to detail the circumstances of her finding him the next morning dead in his bed-room, but dressed, and concluded by saying, that she verily believed that the deceased was by his sudden death deprived of carrying his intentions into effect by a formal execution of his will, for she has not the least doubt but that if he had called upon Mrs. Scott on that day, he would have put a finish to his will by executing the same.

*Swabey and Adams in support of the paper.*

*Arnold* and ——— for the next of kin.

JUDGMENT.

SIR JOHN NICHOLL,

In support of this paper the executor has pleaded, and fully proved, that the deceased entertained the greatest regard for Mary Scott, who was his wife's sister, and her husband John Scott; that he had declared that it was owing to the advice of John Scott that he had acquired his property, and that after the death of his wife he had repeatedly said, that Mary Scott and her children and John should have all that he had; other declarations even stronger than these are spoken to. It also appears that he kept up no intercourse with his own relations, that he never mentioned any relations, and possibly did not know that he had any living.

It is the less necessary to dwell upon this part of the evidence, because there are acts of the deceased, before the Court, which always afford more satisfactory proof of testamentary intention, than declarations. Declarations may be loosely made, and are always liable to be misapprehended or incorrectly represented.

On the 17th of April, 1793, the deceased executed a will, in which his wife and her relations were the sole objects of his bounty, and there is no mention of any relations of his own.

On the 7th of October, 1805, he made another will; by this the whole of his property was given to his wife for life; half to be at her disposal, the other half to *Mary Scott, John Scott*, and their children.

In November, 1805, the wife is stated to have died; this naturally led to a new will; and from the

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contents of the former wills it would be probable that *John* and *Mary Scott* and their family would be the parties solely benefited.

It is pleaded that in 1807, the deceased prepared the paper B. as a draft for the present will; it is indeed for the most part word for word the same as the instrument propounded; the only evidence applying to it is, that it is in the handwriting of the deceased: it is dated in 1807; but in what month of that year it was written the paper does not import; not even whether it was prior or subsequent to the instrument now propounded. That it was the draft of his will is by no means made out; nor is it, I think, at all probable that it should have been; it is, if any thing, more formally prepared than B, and there is a bequest over of the residue to the children in these words:—"All the rest, residue, and remainder of my property, whether real or personal, in possession or reversion, I leave to the said *John* and his heirs for ever, and in the event of his previous decease, to his said children as above, or the survivors of them, or their heirs for ever." These latter words are omitted in the paper propounded, and it is not probable they would have been omitted if B. had been the draft of it.

B. then is not only the more full of the two, but if any thing, the more formal; it is written as fairly, it has paper on a wafer both for the deceased and the witnesses to seal; it is in every respect an instrument prepared and ready for execution, and varying in some degree, it should seem, as if it was not intended as a duplicate. It would therefore be extremely difficult to ascertain, if it were necessary, which of these two papers was last written.

All these testamentary acts, however, serve strongly to point out what were the testamentary intentions of the deceased, up to August 1807; and as far as evidence of this sort can go, they do most forcibly support the instrument propounded.

But evidence of this sort, however strong; is not sufficient. The paper propounded was manifestly intended to be executed by being subscribed, and to be attested by witnesses. And however clear the proof may be that at the time the deceased wrote this paper he intended so to dispose of his property by will, yet it being equally clear that in order to give effect to the instrument he intended to do the further act of signing in the presence of witnesses, the law requires it to be shewn why the further act was not done.

Only one witness has been examined to these important facts; but if that witness is to be believed, and there is nothing to discredit her, she proves a case much more favourable to the support of the paper than the plea itself. And from the testator's habit it is not probable that more witnesses could have been produced to this part of the case. She says that the deceased had no business of his own; and yet from his conversation it was only on his own affairs that he was employed, and therefore it is probable that it was about his will. The description of the size of the paper agrees with these instruments, and confirms their identity. The time of writing, which was ten days or a fortnight before his death, corresponded with the date of the paper A. which was in August.

The last time when she saw him writing was on

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the *Monday* next before the *Wednesday* on which he died; and whether he was then quite completing A., or whether (which is more probable) he was then writing B., it brings the act down much nearer to the deceased's death than is stated in the plea(a).

My predecessors in this place have held the rule strict that the proof must shew a continuance of intention, and that the deceased was prevented from completing the instrument, by the act of God: it is my duty to tread in their steps, and to adhere to those principles which they have laid down. I am not at liberty to depart from them in any instance if I were so inclined; but there is no point upon which I should be less inclined to do it, than upon that now under consideration. I am strongly impressed with the necessity of applying the rule strictly, and with firmness.

In this case it may be said, that on the *Tuesday* the deceased was well, walked out, and would have executed his will; but the continuance and progress of his intention is proved, and the presumption of abandonment is repelled by what the witness states, "that on *Tuesday* night the deceased

(a) This cause first came before the Court in *Trinity Term*, 1808, when the admission of the allegation propounding paper A. was opposed, and the then Judge of the Prerogative Court, (Sir William Wynne,) after stating how strictly he held to the rule he had always endeavoured to enforce as to the execution of testamentary papers, where formal execution appeared to have been intended, expressed nevertheless his opinion that if the facts laid in the allegation should be proved, the instrument would be entitled to be established as the last will and testament of the deceased.

said he should call on Mr. *Scott* the next day, and wished much to see him. Now, connecting this with the fact that the two former wills were executed at Mr. *Scott's* house, that this instrument was only completed on the day before, and that he was anxious to see Mr. *Scott*, is it not highly probable that his purpose was, on the very next day to go to *Scott* to execute this will? and, dying suddenly before the next day, this comes up strictly to the case of the execution being prevented by the act of God.

It might be conjectured that the deceased got up early the next morning (which from the circumstances he appears to have done) in order to go to Mr. *Scott's* before he proceeded to his accustomed occupation at the Bank ; this, however, would be mere conjecture.

Upon the whole, there being such clear proof of long intention to give the whole of his property to this family—not the slightest appearance of any intention to benefit his relations—no ground to suspect any hesitation or doubt in the deceased's mind, the will having been prepared for execution so short a time before his death, and the continuance of intention being brought down to the very day when the act of God intervened and prevented the execution of the instrument. I think that I am departing from no principles which have governed this Court, in pronouncing this paper to be the will of the deceased ; and I do accordingly pronounce for it,

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Probate of a codicil written in pencil, and which had been in possession of the Executor upwards of three years, called in and revoked.

RYMES v. CLARKSON.

**LUKE HALL** put a period to his existence on the *21st of May, 1804*, having been deranged in his intellects for the last twelve months immediately preceding his death; probate was taken of his will, and four codicils, by Clarkson, one of the executors, on the *11th of September, 1804*.

On the *25th of June, 1808*, Rymes, another of the executors, called in this probate, and cited Clarkson to shew cause why the second codicil written in pencil should not be revoked; Clarkson declined contesting the suit, but the codicil was propounded in an allegation by Joseph Hall, a legatee, under the instrument.

This allegation pleaded in substance,

1st, The death of Luke Hall, and then enumerated the several relations entitled in the distribution of his property, if he had died intestate, but stated that he had left a will and four codicils.

2ndly, That the deceased, several years previous to his death, took his niece, Sarah Vowell, to live with him. That Sarah Vowell intermarried with Richard Clarkson, in 1800. That from that period the deceased principally resided at or near the house of Richard Clarkson, at Kingston; and that about twelve months before his death he was attacked with a depression of spirits, and then, for the first time, shewed symptoms of derangement.

3dly, That sometime between the 27th of March 1800, (being the date of the first codicil,) and the commencement of the deceased's derangement, he did, with his own hand, write in pencil the very



codicil propounded, and at the time of his writing it was of sound and disposing mind.

*4thly*, That before the executor took probate of the will and four codicils, a true copy of the second codicil, duly collated, was made and deposited in the registry.

*5thly*, That when Clarkson applied for probate as executor, he was advised, that in consequence of the informal manner in which the said codicils were written, the consent of Joseph Hall, Nathaniel Hall, and Sarah Clarkson, respectively mentioned in the codicil in pencil, was requisite previous to obtaining probate, and he accordingly applied to Joseph Hall and Sarah Clarkson for their consent, and that Sarah Clarkson, then in the presence of Richard Clarkson her husband, assured Joseph Hall that the codicil and memorandum in pencil had been written by the deceased long prior to his having shewn any symptoms of mental derangement, and declared, *that she had frequently seen the will and codicils prior to that time; and, as she observed the codicil to be written in pencil, had advised the deceased to send the same to his attorney, to have them more formally written; and she further declared, and has frequently declared to others, that the deceased was perfectly sensible at the time he wrote the codicil and memorandum in pencil.*

That Joseph Hall and Sarah Clarkson executed proxies, whereby they consented that the probate of the codicil and memorandum in pencil should be granted to Clarkson, with the will and the other codicils, and that Nathaniel Hall being abroad, a

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decree issued against him, to shew cause why the probate should not be granted to Clarkson.

That Rymes and Clarkson had respectively, since the grant of the probate, and before February 1806, when the Master of the Rolls delivered his opinion on the construction of the second codicil, in a suit instituted on behalf of the children of Joseph Hall against Richard Clarkson, for the recovery of their legacies, *on various occasions spoken of the second codicil in pencil, as the act of the deceased while he was of sound mind.*

*The will bore date the 10th of March, 1798, and was regularly made and attested by two witnesses. By it the testator bequeathed a variety of legacies to his numerous relations and friends, of which it will not be necessary for the purposes of the subsequent argument to enumerate more than the following, "Item, I give and bequeath to my brother Joseph Hall, of the city of Bristol, in consideration of his having a large family, 1000*l.* Item, "I give and bequeath unto each of the children of my brother Joseph Hall, who shall be living at the time of my decease, 50*l.*"*

He left his niece "Sarah Vowell (who had since become Mrs. Clarkson,) 1000*l.* and also appointed her residuary legatee. His brother William Hall, John Olding, (a) banker, and Samuel Rymes, were the executors."

*The will* also contained a provision "That if by any unforeseen event his estate and effects should not be competent to answer and pay all the lega-

(a) John Olding died before this suit was instituted.

"cies therein before given, that then and in such  
 "case each and every of the legacies should sustain  
 "a proportionate loss or diminution, upon their  
 "several and respective legacies."

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*The first codicil* was of the 27th of May, 1810. By this, amongst other small bequests, *an additional legacy of 500*l.* was given to his brother Joseph Hall*; and Richard Clarkson was appointed one of his executors, in the stead of William Hall. This instrument was signed and sealed, but not attested.

*The second codicil, the subject of the present litigation, was written in pencil, at the foot of the first, and was as follows:*

"Instead of leaving 2000*l.* to my brother J.  
 "personally, I wish to leave the same sum to him  
 "and his children. N. Hall's legacy of 500*l.* I wish  
 "to leave to my brother D. Hall's children, after the  
 "decease of N. H. and his wife. Instead of 1000*l.*  
 "to Mrs. C. as in my will, I wish to leave 3000*l.* in  
 "trust for the use of Mr. and Mrs. C. during life,  
 "and at their decease to be equally divided among  
 "their surviving children, at the same time leaving  
 "Mrs. C. residuary legatee."

This was neither signed nor dated.

*The third codicil* was in the hand-writing of the deceased, and thus expressed:—"I know my  
 "dear niece Mrs. Clarkson will scrupulously attend  
 "to every request of mine respecting the disposal of  
 "my property, as though mentioned in the body of  
 "my will: it is my wish that mourning rings may be  
 "sent to those friends that she knows I valued and

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"lived in habits of intimacy with, such as my friends  
 " Mr. and Mrs. Olding, Mr. and Mrs. Martin, my  
 " partners, with their wives, Mr. Samuel Shaw, &c.  
 " And it is further my request, that if Miss Sarah  
 " Reeve should be living at the time of my decease,  
 " Mrs. C. would give her a sum not exceeding 50*l*.  
 " and that to depend on her situation and character  
 " at the time. And I further hope and depend on it,  
 " that Mrs. C. will be kind enough to occasionally  
 " see that my unfortunate *little child* Marianne Wall,  
 " is taken proper care of, and educated in such a  
 " manner as to become an useful member of society,  
 " and that she is placed in proper hands: if the mo-  
 " ther conducts herself virtuously and well, she is the  
 " fittest person to have the care of her, but by no  
 " means otherwise. Should the interest of the pro-  
 " perty I have left the child not be adequate to her  
 " support, I doubt not Mrs. C. will with pleasure  
 " contribute something more towards her support,  
 " rather than have the principal broke in upon. I  
 " expect and hope my dear Mrs. C. *will have at least*  
 " *three thousand pounds*, after all my debts and lega-  
 " cies are paid; with my best wishes for her happi-  
 " ness, and that of her dear partner and children,  
 " I sign this.

" 18th March, 1802.

L. HALL."

*The fourth codicil* left 1000*l*. consols, in trust,  
 to the executors, for Marianne Wall, which if she  
 died before she attained the age of 21, was to fall  
 into the residue; it concluded thus:—"I declare  
 " this to be a codicil to my will; witness my hand  
 " this 12th day of May, 1802. L. HALL."

At the bottom of it was written in ink, "I had left  
 " Marianne Wall, mother of the above named child,  
 " a legacy, but have since cancelled it, finding her  
 " conduct to be such (from a dreadful habit of lying  
 " which she has contracted, &c.) as to render her un-  
 " worthy of my esteem, and it is my wish, if possible,  
 " to keep her ignorant as to the residence of her  
 " child that she may never have the least influence  
 " over her." And then followed *in pencil*,

" Instead of the above one thousand consols, to  
 " be one thousand pounds."

*Adams and Barnaby in opposition to the allegation.*

The question at issue is whether this paper is de-  
 liberative, or dispositive? on the face of it it ap-  
 pears to have been intended as a mere memoran-  
 dum; and this idea of its character is confirmed by  
 the deceased's habits of business and regularity,  
 which are clearly evidenced by the several testa-  
 mentary instruments before the Court. Besides, the  
 paper itself contains no dispositive words; it mere-  
 ly expresses a wish; whereas in all his other testa-  
 mentary writings there are the words "I give and  
 bequeath." A simple wish can never have the ef-  
 fect and validity of a bequest. The codicil too is  
 imperfect; it has neither date nor signature; it con-  
 tains only the initials of the names of those persons  
 whom it is supposed the testator intended to bene-  
 fit; in this also the contrast is striking, for all the  
 other codicils are dated and signed. Add to this  
 too, it is written only in pencil.

Court.—"What would be the effect of it, should d

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it be proved that this paper was written at the same time with the pencil memorandum in the third codicil?"

*Argument resumed.*

Even then it would be liable to all the objections arising from its obvious imperfection. Besides, we are given to understand, that a question is now pending before the Court of Chancery for the purpose of ascertaining whether these legacies are accumulative; and if the Court of Chancery should, as it is to be apprehended it will, pronounce that they are to be so considered, they will be at complete variance with the intentions of the deceased and the whole disposition of his property, inasmuch as there will not be assets sufficient to discharge the legacies, and nothing can be better established than his intention to benefit the residuary legatee.

*Arnold and Swabey contra.*

The admission of this allegation has been opposed on various grounds, viz. as to the material with which the codicil is written, as to the form of words in which it is drawn up, and as to its repugnance both to the circumstances and habits of the testator, and to his acts as they stand before the Court.

With respect to the material; it cannot be denied but that a man may write his will with any material he pleases: it may be imprudent to write it with a material liable to easy obliteration; but a will written in pencil is as valid as a will written in ink,

and so is a codicil. The material may be a circumstance to guide the Court in deciding whether the deceased intended it as a final disposition or not? but standing by itself it cannot be questioned: if, for the sake of argument, the presumption is admitted, that if a man has written all his other testamentary acts with a more durable material, that which is written in pencil is not of equal weight; still if the party has done other testamentary acts in pencil, which stand undisputed, then that presumption falls to the ground. Though done with an unusual material, it is not done with an unlawful one, since by the law of England the greatest possible latitude is allowed in this respect; a will in chalk or slate is a good will; it may be written *quocunque modo velit, quocunque modo possit*; the testator may, like the Roman soldier, write it on the ground with his sword. (b)

Again, it is said that this paper has not the formalities which make it a solemn and perfect instrument; that it has neither date, attestation, nor seal.

(b) “*Quancumque militum testamenta juris vinculis non sub-  
jiciantur cum propter simplicitatem militarem quomodo velint,  
et quomodo possint ea facere his concedatur.*” Cod. lib. 6.  
tit. 21. sec. 3.

(b) The Roman soldier was indulged with very peculiar privileges and immunities in making his will: it is presumed that this part of the argument has reference to the following passage in the Code. “*Proinde sicut juris rationibus licuit, et semper licebit, si quid in vaginâ aut clypeo literis sanguine suo rutilantibus adnotaverint, (milites) aut in pulvere inscripserint gladio suo ipso tempore quo in prælio vitæ sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.*” Cod. lib. 6. tit. 21. sec. 15.

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To this we reply, that it is in the hand-writing of the testator, and that therefore the Court is bound to receive it without those formalities.

As to the time at which it was written, if we were left to conjecture we should submit that there were good grounds for supposing that it was subsequent to the other testamentary acts; and at that time when the pencil writing was added to the other codicil, consequently that it was written upon a revision of all that he had done before; with respect however to this, it is no otherwise really material than that, in order to give it validity, it must be proved to have been written during the time that the testator remained of sound and disposing mind.

The words of the paper have been objected to; but we conceive it cannot be denied, that any words of bequest which state the inclination of the deceased's mind, have been determined to have the effect of direct dispositive words. A will may be good without dispositive words, where the testator has not made the whole of his will in these words; the Court will look to his intention and to his acts.

It is said that the words are equivocal, and we admit that they are not so dispositive as "I give and bequeath." "I wish," generally speaking, is indicative of the will without the power of giving; but when the person wishing has the power as well as the inclination, when he has stated the inclination he is to be considered as having done the act.

Again, it is objected that the party might have put this into the same form that he has put the other codicils. To this we reply, that we are to presume



that he knew what the law was with respect to the disposal of his personal property, and that his will thus expressed would be operative. Further, it is contended that the deceased does not give a correct description of the acts he wished to do ; this would found something of an argument against his capacity ; but we contend the description is not so varying and incorrect as would lead to the conclusions assumed by the other side ; though inaccurate, it is not such an inaccuracy as the Court would consider of importance. He recites the legacy to Hall correctly, and afterwards gives the benefit to his other brother's children in remainder. But then the counsel on the other side, assuming the hypothesis that the legacies are accumulative, say that there would be no residue ; we maintain that the argument may be taken the other way, that the deceased doubted whether he had sufficient property to carry into effect what he intended ; he was in trade, and his property subject to contingencies, and even if his legacies were to suffer a *pro rata* diminution, still the principal object of his bounty would have the largest proportion. It is then argued, that as the legacies must be taken cumulatively there would be no assets. This might be an argument against their being considered as accumulative ; but the door cannot be opened to that argument till the Court has declared whether the paper is testamentary or not. This Court has only to consider whether the paper is in such a form as will entitle it to probate : it is for another court to decide what will be the effect of it.

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The fourth article of the allegation has been opposed as pleading facts which will not aid the case, inasmuch as they are not the acts of the testator; they are acts however not without their weight, and, from their bearing on the present suit, extremely material to be brought to the notice of the Court.

The Court took time to deliberate.

Feb. 18.

JUDGMENT.

SIR JOHN NICHOLL,

As the decision of the Court respecting the admission of the allegation may probably dispose of the whole case, I have been induced to consider it maturely: and it may be necessary also that I should state fully the conclusions at which I have arrived.

It has been truly said, that the allegation goes little, if at all, further than to plead that the deceased was of sound mind when the paper in question was written. The date is not attempted to be fixed nearer than three years; it contents itself with pleading, that it must have been written after the 27th of March, 1800, and before his derangement which took place in May, 1803.

The Court has endeavoured to ascertain, and has put it to the Counsel to say, whether from the internal evidence arising from the papers, it could at least be fixed whether it was written before or after the two codicils of 1802. But there is nothing on this point beyond mere conjecture; the time is left at large for upwards of three years, nothing to shew whether it was written after the codicil of 1800; whether at the same time as the me-

morandum at the foot of the codicil of May, 1802; or whether it was at some later and different time: the allegation pleads neither any declarations applying to it, nor any recognition of it. The fifth article indeed sets forth some declarations of Mrs. Clarkson the residuary legatee, and of the executor, but not of the strongest sort; they merely go the length of stating, that the paper was written prior to his derangement, and that she had advised the deceased to send to an attorney to have it more formally executed. But there is no averment that the deceased declared that this pencil writing was sufficient in its present form, and that he intended it should operate in its present state, nor any thing to that effect; still less is there any attempt to shew that the deceased had not full opportunity to write it in a more formal and complete manner, as he had done the other codicils.

Some question has been made whether the declarations of Mrs. Clarkson are admissible evidence? It has been said, that she may be examined against the executor opposing the codicil, as a witness; if so, her declarations cannot be pleaded. But there are some doubts (which it is not necessary to decide) whether either her declarations or her depositions can be taken as evidence; she is a legatee under the codicil; and if the assets should fail, she may be more benefited as legatee under the codicil, than as residuary legatee under the will. She is also the wife of the executor, who has taken probate; and can the wife of the executor be examined as a witness?

The main, however, and indeed the sole ques-

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tion is, what is the description of the paper? And what was the intention of the deceased respecting it? Did he write it and intend it as a memorandum, concerning which he was to deliberate, and in case he should come to a final determination to make these alterations and additions, and thence to draw up a fuller and more formal paper? Or had he already come to that *final resolution*; and did he write this paper meaning that it should operate in its present form? And having no intention to do any further act to give it effect? For I take it to be the duty and very function of the Court of Probate to decide *quo animo* the paper was written, was it *animo testandi*, or only something preparatory to his final disposition? This was the doctrine the (c) Court of Review held in *Matthews v. Warner*, though the paper in that case was signed and dated, and expressly termed “this (d) my will.” Now the intention of the testator in this respect can only be judged of and decided upon from due consideration of all the

(c) When then, at what period, did the *voluntas testandi* exist in his mind quoad this instrument? It is admitted, as it must be, that when he subscribed his name, he was looking to some future act; the decision that this is his will, would destroy the most general maxim I know of *voluntas testatoris ambulatoria est usque ad mortem*. See Ld. Chancellor Rosslyn’s judgment, *Vesey, Jun. Vol. IV. p. 210*.

(d) “I appoint my good friend Mr. Edward Epine, and my good friend Mr. Edward Johnson, my Executors, to see this my *last will* and testament complied with. Dated at Deptford, 2d Oct. 1785.

WM. MATTHEWS.”

*Vesey, Jun. Vol. IV. p. 186.*

circumstances before the Court. It has been objected, that it is written in pencil; to this it has been replied, that the deceased had a right to write his will with a pencil, or to write his will and three codicils in ink, and a fourth in pencil; and so he has undoubtedly, and it would be valid in law, provided the Court could be satisfied that he intended so to do. For instance, if he had added, I have written this codicil in pencil, but intend it shall operate as my will; or if it could be accounted for by shewing that he had no other materials, as it was permitted to the dying soldier to write his will with his sword in the dust. But when the question to be decided is the previous one, whether he did intend this paper as the final declaration of his mind, and as a codicil, or whether it was merely preparatory to a more formal disposition? The material with which it is written becomes a most important circumstance, and the importance of it is still further increased when the Court sees that the deceased made other codicils, all formally written in ink, one before this paper, others possibly after it. Then the natural and rational conclusion is, that this was a mere memorandum for future deliberation, and not a finished instrument intended at all events to become a part of his will, or, as far as it goes, to alter and controul both that previous will, and a codicil regularly executed.

*Secondly*, the same course of reasoning applies to its being neither signed nor dated. It is said that the law neither requires subscription nor date: this would be perfectly true if there had been other proof that the deceased intended it, as a final

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testamentary act. But when we are engaged in an inquiry whether it is finished or incomplete, the want of date and signature is also exceedingly important.

The *third* objection taken is, that the paper is not in dispositive terms. To this it has been answered, that terms of wish and request are frequently construed imperatively, and that in the paper of the 18th of March, about which there is no question, the same expressions are used. The answer may be true, but it does not remove the pressure of the objection upon the real point in the case: The natural and usual terms which a person adopts when he writes a paper intended as his final testamentary disposition are, "I give," or "I bequeath," not I wish to give: and although in the paper of the 18th of March the same expressions are to be found; yet that very paper is rather a confidential expression of his wishes, addressed to his niece Mrs. Clarkson, than a formal codicil; but in the two formal codicils of the 27th of March, 1808, and that of the 12th of May, 1802, the terms are dispositive, "I give," "I bequeath." The objection therefore, though not of the most powerful cast, has nevertheless a bearing upon the consideration of the question whether this was intended as a final operative paper, or whether it was a loose memorandum for future consideration.

*Fourthly,* The same inference is to be drawn from the inaccurate manner in which the paper refers to the bequests in the will: the words are "*Instead of leaving 2000*l.* to my brother J. personally, I wish to leave the same to him and his*

" *children* : " whereas the fact is, that he has left his brother *J.* 1000*l.* by his will, and 500*l.* by a codicil. This inaccuracy is rather characteristic of a loose memorandum than of an instrument finally and deliberately intended to operate. In this, as in some other passages, persons are only described by their initials : this again tends to the same conclusion.

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*Fifthly*, It has been stated, that if this paper should be established, the legacies will become accumulative ; and if they are accumulative, that then the residue will fall considerably short of 8000*l.* to which extent it is obvious the testator intended to benefit Mrs. Clarkson. To this it has been truly answered, that if the deceased has made a will producing an effect different from his intention, the Court of Probate must nevertheless establish that will. But the question is upon an imperfect informal paper ; the evidence of intention from extrinsic circumstances is let in, and the Court only establishes a paper labouring under such imperfection and informality for the purpose of carrying into effect *intentions clearly established*. In this instance, however, it is not clear that the effect suggested would be produced ; either that the legacies would be accumulative ; or, that if they should be so considered, that the residue would be insufficient : and therefore the Court does not rely upon this argument. But the consideration at least may, indeed ought in all instances, to go to the extent of putting the Court of Probate extremely on its guard against pronouncing for informal papers, which are to operate in conjunction with a com-

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plete will and codicil; if it were otherwise, it might happen that when these papers came to be construed together in another court, instead of carrying into effect the wishes and intentions of the testator, they might produce an effect totally contrary to them. Great caution therefore should be observed, and the Court should clearly be satisfied that the testator intended the paper should make a part of his will; and that, once established, it cannot look to the effect.

Upon the whole of this case, the Court is of opinion that this instrument is to be considered as an incomplete, imperfect, and unfinished paper.

The testator had executed a complete formal will: he had added two codicils regularly drawn up by himself and fairly transcribed, to which he had affixed his signature. Considering, therefore, that the paper now propounded is a mere writing in pencil, on one of the instruments, not dated, nor signed, describing persons by initials, and not even referring correctly to the will, it appears to be a mere loose memorandum of something that passed in his mind, at the moment he was writing, and which possibly never again recurred to his recollection. And when the allegation propounding this paper offers nothing in support of it, beyond the mere handwriting and sanity of the testator; states no circumstances that can fix the date, or shew whether it was written four years before his death, or a few days only previous to his insanity; and in no manner whatever accounts for the imperfect form in which it is produced; I am of opinion, that the circumstances



in the plea, taken in conjunction with the paper, would not be sufficient, if proved, to establish the codicil, and therefore I must reject the allegation.

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## SANDFORD v. VAUGHAN AND OTHERS.

Feb. 29.

SIR JOHN CHICHESTER, Bart., died on the 30th of September, 1808, possessed of large landed estates, and personal property to a very considerable amount. He left the following papers of a testamentary import.

An allegation, propounding four papers, as containing together a will, admitted to proof.

No. 1. "I, Sir John Chichester, of Upper  
" Grosvenor Street, in the county of Middlesex,  
" do give and bequeath to my friends, hereinafter  
" mentioned, the following legacies, to be paid  
" out of my personal estate, within one year after  
" my decease. To the Rev. John Sanford, of  
" Sherwell, the sum of ten thousand pounds ster-  
" ling money, together with my furniture, in  
" Grosvenor Street, and at Wickham in Kent,  
" plate excepted. To the Rev. Thomas Hole, of  
" George Ham, in the county of Devon, five  
" thousand pounds. To the Rev. Henry Hutton,  
" of Guy's Hospital, five thousand pounds. To  
" the Rev. Thomas Boyce, of Brendon, in the  
" county of Devon, one thousand pounds. To  
" the Rev. Charles Davie, of Heanton, in the  
" county of Devon, one thousand pounds. To

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“ my servant, Robert Belringer, the sum of seven  
 “ hundred pounds. *To all my other servants,*  
 “ *two years’ wages ;* except Margaret Philips, to  
 “ whom I give an annuity of thirty pounds a year,  
 “ during her life. To Nicholas Mackin, late serv-  
 “ ant to my father, thirty pounds a year during his  
 “ life. To Mr. Thomas Hole, son of the Rev.  
 “ Thomas Hole, the sum of one thousand pounds.  
 “ To Mrs. Pilcher, daughter of the said Thomas  
 “ Hole, one thousand pounds. To Mrs. Vaughan,  
 “ Mrs. Fry, and Mrs. Edwards, daughters of my  
 “ late uncle William Chichester, five hundred  
 “ pounds each. To Charlotte and Jane Sanford,  
 “ daughters of the late John Sanford, of Ninehead,  
 “ three thousand pounds each.  
 “ 27th May, 1808.

## JOHN CHICHESTER.”

No. 2. “ I, Sir John Chichester, of Upper  
 “ Grosvenor Street, in the county of Middlesex,  
 “ do give and bequeath to my friends, hereinafter  
 “ mentioned, the following legacies, to be paid  
 “ out of my personal estate, within one year after  
 “ my decease.

“ To the Rev. John Sanford, of Sherwell, in  
 “ the county of Devon, the sum of ten thousand  
 “ pounds sterling, together with my furniture, in  
 “ my houses in Upper Grosvenor Street, and at  
 “ Wickham, plate only excepted. To the Rev.  
 “ Thomas Hole, of George Ham, in the county of  
 “ Devon, five thousand pounds sterling. To the  
 “ Rev. Henry Hutton, of Guy’s Hospital, five  
 “ thousand pounds. To the Rev. Thomas Boyce,  
 “ of Brandon, in the county of Devon, one thou-

" sand pounds. To the Rev. Charles Davie of  
 " Heanton, in the county of Devon, one thousand  
 " pounds. To Mr. Thomas Hole, son of the Rev.  
 " ——— Hole, one thousand pounds. To Mrs.  
 " Pilcher, daughter of the said Thomas Hole, one  
 " thousand pounds. To Mrs. Vaughan, Mrs. Fry,  
 " and Mrs. Edwards, daughters of my late uncle  
 " William Chichester, five hundred pounds each.  
 " To Charlotte and Jane Sanford, daughters to  
 " the late John Sanford, of Nynhead, three thou-  
 " sand pounds each. To my servant, Robert Bel-  
 " ringer, seven hundred pounds. To my servant,  
 " Margaret Philips, an annuity of thirty pounds a  
 " year, during her life. To Nicholas Mackin, ser-  
 " vant of my late father, an annuity of thirty  
 " pounds a year, during his life. And I appoint  
 " the aforesaid John Sanford, clerk, my executor.  
 " In witness whereof I have hereunto set my hand  
 " and seal, this twenty-eighth day of May, one  
 " thousand eight hundred and eight.

JOHN CHICHESTER, L. S.

" *Witness*

" ABRAHAM SCOTT.

" *May 29th, 1808.*

" I give to Mr. Scott, of St. Alban's Street, five  
 " hundred pounds.

" JOHN CHICHESTER."

No. 3. " Whereas I have, by a paper signed  
 " and sealed by me, dated the twenty-eighth and  
 " twenty-ninth days of this instant May, given se-  
 " veral legacies to persons therein described; Now  
 " I do hereby give to Mr. William Sanford, of

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" Bond Street, wine merchant, the sum of 3000*l*.
 " To Mrs. Jekyl of Bath 1000*l*. To Elizabeth
 " Sanford of Bath, spinster, 1000*l*. and to Major
 " Sanford of Bath 1000*l*. To Mrs. Standard,
 " daughter of Mrs. Mason, 100*l*. To Mr. Abra-
 " ham Scott 500*l*. in addition to the 500*l*. that I
 " gave to him by the paper signed by me, the
 " 28th day of this month. I give to Sir Henry
 " Oxenden, of Broome, in the county of Kent,
 " Bart. to the dowager lady Langham of Wimble-
 " don, and to my friend Dr. Bridges of Clifton,
 " each, a ring of the value of fifty guineas as a
 " small token of my remembrance. Witness my
 " hand and seal this thirty-first day of May, one
 " thousand eight hundred and eight.

" JOHN CHICHESTER, L. S.

" Signed and sealed in the
 " presence of

" S. HARMAN."

" As I have this day given directions to Mr.
 " Harman to prepare a will for me, disposing of
 " my paternal and maternal estates: but lest I
 " should die before the same can be got ready for
 " my signature, I do hereby give all the timber
 " growing upon the estates of my mother, which
 " I inherit from her, that is fit and proper to be
 " cut down, to George Chichester Oxenden, se-
 " cond son of Sir Henry Oxenden, Bart. for his
 " own absolute use and benefit.

" JOHN CHICHESTER.

" *Witness*

" S. HARMAN."

No. 4. " I give my estate of Ashton, in the
 " county of Devon, to George Chichester Ox-
 " enden, second son of Sir Henry Oxenden,
 " Baronet, of Broome, in the county of Kent.

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" I give the house in Seymour Place, for which
 " I have given a memorandum of agreement to
 " purchase (and which is to be paid for out of
 " timber which I have ordered to be cut down) to
 " the Rev. Dr. Sandford, of Sherwill, in Devon-
 " shire.

" Signed Sept. 3, 1808.

" JOHN CHICHESTER, L. S.

" In the presence of

Thomas Humby,

Wm. Williams,

Charlotte Whitehouse.

No. 5. The draft of a will of very considerable
 length, interspersed with frequent interlineations
 and erasures, and concluding thus :

" In witness whereof I have hereunto set my hand
 and seal; that is to say, my hand to the ————
 sheets thereof, and my hand and seal to the last
 sheets thereof, this ——— day of ———, in the
 year of our Lord, 1808."

Then followed an attestation clause, but not sub-
 scribed by witnesses.

No. 6. A fair copy of the last-mentioned paper
 prepared for execution.

An allegation was brought in on the part of the
 Rev. John Sandford, the executor named in No. 2,
 propounding 1, 2, 3, and 4, as containing together
 the last will and testament of the deceased.

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Swabey and Phillimore, for the next of kin, (a) opposed the admission of that part of the allegation which propounded *No. 1*, as forming any part of the will of the deceased, on the grounds that it was obviously the mere instructions or rough draught from which *No. 2* was transcribed: that it would be a dangerous precedent to allow instructions to go to proof together with the will which was framed from them. To what purpose would it be to encumber the proceedings with superfluous and unnecessary evidence? Safer far was it for the Court to take its stand here, as it were on the threshold of the cause, and reject one of these instruments altogether. The force and effect of it might be as well discussed in this as in a subsequent stage, inasmuch as not a single circumstance was alleged in the plea, which tended in any way to shew that the deceased had any idea that both of them would stand as his will: the question, therefore, was one to be decided on principle; and if reference was had to the civil law for authority, whatever might be the inclination of that law in some instances, as to (b) cumulative lega-

(a) The next of kin who were entitled to as much of the property of Sir John Chichester as might be undisposed of by will were all cousin Germans; viz. Mrs. Vaughan, the Dowager Lady Langham, Mrs. Jekyll, Sir Henry Oxenden, Bart. Mrs. Fry, Mrs. Edwards, William Sandford, Esq. Miss Eliz. Sandford, and several others.

(b) Generally by the civil law the burthen of proving the case rested on the plaintiff on this principle:—"Ei incumbit probatio qui petit, non qui negat;" but where a specific legacy was bequeathed in a will, and repeated totidem verbis in a codicil, the rule of law was considered to be changed; and the

cies; yet as to this particular point, it spoke a positive language, since the following passage from the digest stated a case analogous to the one at issue;—"Binæ tabulæ testamenti eodem tempore exemplarii causâ scriptæ, ut vulgò fieri solet, ejusdem patris familias proferuntur;—in alteris centum,—in alteris quinquaginta aurei legati sunt Titio: quæres utrum et quinquaginta aureos, an centum duntaxat habiturus sit? Proculus respondit; in hoc casu magis hæredi parcendum est, ideoque (c) utrumque legatorum nullo modo debetur, sed *tantummodo quinquaginta aurei.*" Sir John Chichester evidently never intended the legacies to operate cumulatively; but, if probate were granted *both of No. 1 and No. 2*, they might, from that circumstance alone, receive in a court of construction such an interpretation as would double the bequests, and defeat the intentions of the testator, it was needless, in this case, to resort to extrinsic evidence for proof of the tes-

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heir was expected to bring proof to shew that the testator did not intend the two bequests to take place.—"Quinquaginta testamento tibi legata sunt; idem scriptum est in codicillis postea scriptis, refert, duplicare legatum voluerit, an repetere; et oblitis, se in testamento legasse, id fecerit, ab utro ergo probatio ejus rei exigenda est? primâ fronte æquius videtur ut petitor probet, quod intendit, sed nimirum probationes quædam a reo exiguntur. Nam si creditum petam, ille respondeat solutam esse pecuniam; ipse hoc probare cogendus est, et hic igitur, cum petitor duas scripturas ostendit, hæres posteriorem inanem esse, ipse hæres id adprobare judici debet." Dig. lit. 22. tit. 3. leg. 12. See also, as connected with the subject of cumulative legacies, Dig. lit. 30. tit. 1. leg. 34.

(c) Dig. lit. 31. tit. 1. leg. 47.

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tator's mind: the internal evidence arising from the instruments themselves, was irrefragable. Did not the appointment of an (*d*) executor, in *No. 2.* shew that that paper, and not *No. 1.*, was the real testament? and who could read the preamble to *No. 3.* without being convinced that it was the intention of the deceased, that *No. 1 and No. 2* should not both have a testamentary effect?

Arnold and Adams for the executor deprecated the idea of rejecting a paper of this nature in the handwriting of the deceased, without allowing it to go to proof; and contended that before the court took so decided a step, it must be quite satisfied that *No. 1* could not have any testamentary operation whatsoever; many of the arguments offered on the other side were premature, more especially those which related to cumulative legacies; they might, perhaps, be introduced with more effect into a subsequent stage of the proceedings; but, at present, it was essentially and indispensably necessary, that the Court should have all the papers before it, in order that it might arrive at a correct opinion, whether or no they were all entitled to probate.

JUDGMENT.

SIR JOHN NICHOLL.

The ultimate question will be, Whether these four papers can stand as the will of Sir John Chichester? But that rests on very different ground from the point which is more immediately before the Court; viz. whether I can, in the present

stage of the cause, decide that one of them must be rejected.

In order to establish the four papers, the Court must be satisfied that it was the intention of the deceased that all of them should compose his will: supposing therefore, that no other facts should be proved than those which are stated in this allegation, the court will have very little difficulty in deciding, that No. 1 cannot form a part of the will.

No. 2 is almost verbatim a transcript from No. 1; it is of posterior date, and contains the appointment of an executor. It is true that it omits legacies to several servants which are to be found in No. 1; but it is to be observed, that No. 3, a paper regularly signed and attested, has a direct reference to No. 2, but none to No. 1.

If the Court were bound to decide on these circumstances, it would consider No. 1 as the mere draught from which the more formal will was made; and I take it to be quite clear, that, where instructions are subscribed as preparatory to a will, the execution of that will entirely supersedes the instructions.

It might be dangerous to send both these papers to a Court of Construction, lest they should be considered as doubling the legacies: that they were not intended to be cumulative is evident from this, amongst other circumstances, that there is a specific legacy of the same furniture in both instruments; if both papers were intended to operate, this bequest would never have found its way into the second paper.

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It is not, however, necessary, to decide this point now; but I have thought it material to state my present impressions, in order that the parties may be able more perfectly to instruct the cause.

I see no objection to let it stand in the allegation, that the deceased, with his own hand, wrote No. 1: I am not bound, on that account, to pronounce for it. Facts may come out upon the examinations of the witnesses, which may put the case in another light; but, if the Court sees them in the same point of view in which they now appear, it will not pronounce for it.

Upon this understanding I admit the allegation to proof.

An allegation, propounding an imperfect and unexecuted paper, rejected.

ANOTHER allegation was offered on a subsequent day, in this cause on the part of James Buller, Esq. William Ashford Sandford, Esq; and the Rev. Thomas Hole, three of the executors named in No. 5, (a) for the purpose of propounding that instrument as the last will and testament of the deceased.

This allegation consisted of fourteen articles, and detailed a variety of circumstances which had occurred within the four last months of the deceased's life to account for the unfinished state of the instrument.

Swabey and Phillimore, for the next of kin, contended that the allegation was objectionable

(a) See Page 49.

both as to form and substance;—as to form, on account of the vague and diffuse style in which it was drawn up;—as to substance, inasmuch as if all the facts contained in it should receive the most full and ample proof, they would, nevertheless, be utterly insufficient to establish *No. 5.* as the will of Sir John Chichester.

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VAUGHAN
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Burnaby and Stoddart, on the behalf of the executors named in *No. 5.* argued for the admissibility of the allegation.

JUDGMENT.

SIR JOHN NICHOLL.

The question which the Court has to decide, is, Whether this allegation is admissible? Objections have been taken both as to the form and substance of it: it is said to be too diffusely drawn—and so undoubtedly it is; many circumstances, particularly in the early part of this history, are too minutely detailed; whereas, in other parts, where it ought to be more minute and specific, it is too much compressed. It is highly desirable undoubtedly to compress pleas of this nature as far as may be consistent with a perspicuous exposition of the leading facts of the case: the more distant parts of the statement, which cannot bear strongly on the point at issue, ought not to be too diffusely spread out; and where the object is to deduce a continuance of intention, it is obvious that the latter part of the period becomes the most important; and it is there where we should expect to find the most stringent facts.

Another objection to the formal part is the enumeration of all the next of kin by name at the

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conclusion of every article ; and this occupies nine or ten lines in each of them. It has been a very convenient rule of modern practice to omit the repetition of this recital ; and it is most extremely desirable, that every thing should be omitted, which, in however trifling a degree, may tend to increase the expense of the parties contesting the suit.

If, however, the objections were merely technical, or confined to the circumstance of the plea being too diffuse or too much compressed, the Court would refer it back to the proctor, to be amended and altered under the advice of his counsel.

To proceed, therefore, to the substance of the allegation : since it is clear that no advantage can result to the parties from the admission of it, unless there is a prospect that it will establish their case.

Where an unfinished draft is propounded, it must be shewn that the deceased was prevented, by invincible necessity, or by the act of God, from completing it. A person certainly may, in the last moments of his life, so recognize a testamentary paper written twenty years before, as to give it effect and validity, without any formal execution : the length of time during which it had continued unfinished would not of itself be sufficient to induce the rejection of such a paper, although it would create a circumstance of strong presumption against it.

[The Court then commented at considerable length upon the several circumstances which had been alleged in the plea, and concluded with the following observations :—]

Upon the whole, considering that there are two

papers executed and attested in May; that they contain no disposition of the residue; that the draft in question was prepared four months anterior to the death of the deceased; that he had abundant opportunity to execute it; that subsequent to its being thus prepared, viz. on the 3d of September, he executed a will for the disposal of real estates; and that during his last illness he made no express reference to this draft: I think the allegation does not set up a case which is likely to succeed; indeed, if all the facts laid in it should be proved, I see no prospect that No. 5. could be established.

I shall not, however, proceed absolutely to dispose of this allegation; but shall allow the parties an opportunity of amending and supplying the deficiencies of it. Feeling, however, it my duty to adhere firmly to the principles I have laid down, if the deficiencies I have pointed out cannot be (b) supplied, I shall decidedly reject the plea

1809.
Trinity
Term.

SANDFORD
v.
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MAIDMAN v. ALL PERSONS IN GENERAL.

1809.
Easter
Term,
March 23.

THOMAS GILBERT died in 1771, having by will bequeathed a legacy in the following terms: viz.
“ To the preacher at Kingsland Chapel a long

(b) In consequence of this permission a second allegation was tendered to the Court, on the behalf of the executors, named in No. 5, which, after undergoing considerable discussion, was rejected as inadmissible.

1809.
Easter
Term.
MAIDMAN
v.
ALL PERSONS
IN GENERAL.

“ annuity of four pounds five shillings and six-
pence per annum, on condition that my wife
keeps her pew without any further subscription,
so long as Divine service is performed there
every Sunday morning, or till the time limited
for their expiring.”

Henrietta Gilbert, his wife, and James Gilbert, were the executors appointed by this will and a codicil, and the wife was residuary legatee.

In October 1771, the widow alone proved the will and codicil : she afterwards intermarried with Thomas Bolas, and died in the course of the year 1772. Bolas, as administrator of his wife, took out letters of administration with the will and codicil annexed of the unadministered goods of Thomas Gilbert. Bolas is since dead ; and no legal representative to Henrietta his wife appears to exist ; and for want of such legal representative to administer to the unadministered goods of Thomas Gilbert, the preacher at Kingsland Chapel cannot realise his annuity.

Accordingly, the reverend James Maidman, the officiating minister at the said chapel, took out a decree, *citing all persons interested in the goods of Thomas and Henrietta Gilbert deceased, to take out letters of administration with the will and codicil annexed of the said Thomas Gilbert, or to shew cause why the same should not be granted to the reverend James Maidman, limited to the interest of the said Thomas Gilbert, in the annuity of four pounds five shillings and sixpence, and so long as Divine service should be continued to be performed in the chapel, or until the time limited for their expiring.*

An application was now made to the Court, by motion of Counsel, to permit the administration to go to the syndic of the governors of St. Bartholomew's Hospital, who are the patrons of the chapel, instead of to the officiating minister.

The Court hesitated on the ground that the decree had issued on the behalf of Mr. Maidman, and thought it questionable whether it would not be necessary to take out a new decree.

Sir JOHN NICHOLL.

I shall allow the administration in this case to go out to the syndic of the governors of St. Bartholomew's Hospital, instead of to Mr. Maidman. In point of practice, it is not uncommon upon a decree issuing to shew cause why administration should be committed to *A. B.* a creditor, to substitute *C. D.* another creditor, on the day assigned for the appearance of the parties interested, and to suffer administration to pass to *C. D.* though not the person in whose name the decree originally went.

This is an analogous case.

1809.
Easter
Term.

MAIDMAN
v.

ALL PERSONS
IN GENERAL.

April 19.

GREEN v. SKIPWORTH AND OTHERS.

Hilary
Term.
March 23.

THOMAS GREEN, of Little Thurroch, in the county of Essex, died on the 11th of December, 1808, leaving personal property to the amount.

An allegation propounding a will made by interrogatories, admitted to proof.

1899.
Hilary
Term.



GREEN

v.

SKIPWORTH
AND OTHERS.

of nearly 8000*l*. His widow prayed probate of the following testamentary schedule written in pencil:—

“ I *shall* leave Mrs. Green all the *stock, effects,*
“ and improvements, and as to any thing else,
“ I shall *speak* to you again, Sir.”

“ *George Kavanagh,*

“ *John Mills Evans.*”

“ Do you wish now to give any further direc-
“ tions as to farms or otherwise ?”

“ Not at present.”

“ *George Kavanagh,*

“ *John Mills Evans.*”

“ *Quere*—At the instance of Mrs. G. and Mr.
Wilson.”

“ In case of any thing happening to you, who
“ do you wish to have the farms—the Skipworths,
“ Mr. Wilson, or who ?”

“ *Answer*—Mrs. Green.”

“ *George Kavanagh,*

“ *George Dandridge,*

“ *John Mills Evans.*”

The allegation in which the schedule was pro-
pounded pleaded :—

“ That the deceased having been taken sud-
denly ill, on the 10th of December last, sent a
message by Mr. Dandridge, a neighbour, to Mr.
Evans, an attorney, desiring his immediate at-
tendance to make his will.

“ That Evans, immediately on receiving the message, went to the deceased, and found him extremely ill; and, although of perfect mind, scarcely able, from bodily pain, to hold much conversation; that the deceased himself first addressed Evans, by observing, that he found himself scarcely able to talk to him; whereupon Evans requested him not to hurry himself, and sat down on the side of his bed; and, after a short interval, observing the deceased again preparing to speak to him, said, that it might save him unnecessary exertion, and probably be the best means of carrying his purpose into effect if he would allow him to ask him a question or two, to which the deceased signified his assent; that Mr. Kavanagh the apothecary who attended the deceased, was in his room, and Evans in his presence proceeded by asking the deceased whether it was his wish to give any instructions for his will? to which the deceased immediately replied, ‘ *I shall leave Mrs. Green all the stock, effects, and improvements; but as to any thing else, I will speak to you again, Sir.*’ Whereupon Evans wrote down such his reply with a black-lead pencil; and the same having been read over to the deceased, he signified his approbation thereof, and Evans and Kavanagh subscribed their names in pencil; and Mr. Wilson a relation, being in the house, was called up into the room, and the clause was again read over to the deceased, and he was asked by Evans if that was what he wished, to which he distinctly answered, ‘ Yes.’ That he was then also asked if he wished to give any farther instructions as to

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Hilary
Term.

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v.
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AND OTHERS.

1809.
Hilary
Term.
 ~~~~~  
 GREEN  
 v.  
 SKIPWORTH  
 AND OTHERS.

farms, or otherwise; but, appearing to suffer an increase of pain and bodily illness, he replied; '*Not at present.*' That this question and reply were written down by Evans, and attested by him and Kavanagh.

" That the several persons then left the room, and shortly after the deceased's wife came into the parlour to them, and requested them to return into the deceased's room, as he had expressed a desire to give further directions. Accordingly they went back, and found the deceased somewhat revived, but still in great pain; and Mr. Dandridge who was in the house was also called up; that Evans having noticed how the deceased had appeared to suffer from his efforts to speak, observed that every means should be used to save him as much as possible from such exertion; and, therefore, if it was approved of, he would ask the deceased any one or more questions they might wish, and would endeavour to put the same to him in as few words as possible; which proposal was assented to by all persons present, and also by the deceased himself; that thereupon the following question was put, being first written down with a black-lead pencil, by Evans, '*In case of any thing happening to you, who do you wish to have your farms? the Skipworths, Mr. Wilson, or who?*' to which he replied, '*Mrs. Green.*' and the question being again read over to him, he repeated the same answer; that Mrs. Green being requested to withdraw, the question was again put to him in her absence, and he again replied in the same manner; whereupon Evans

wrote down the reply, and together with Kavanagh and Dandridge subscribed it.

“ That immediately after the premises the deceased’s bodily pain much increased, although he still retained the right use of his mental faculties ; but shortly afterwards he became wholly worn out with pain, and was rendered incapable of proceeding further in the giving instructions for and executing a more formal will, and he died on the middle of the following day.”

Three nephews (the next of kin) of the deceased contested suit against the widow.

*Adams and Jenner for the nephews*, argued that this was not a testamentary paper, and that the allegation did not uphold it as such.

*Arnold and Swabey for the widow*,

The paper is in an extraordinary form ; but the circumstances under which it was written are so extraordinary as to justify that form. The testator was *in extremis* and so affected, that although he was in the full exercise of a testamentary capacity, he was scarcely able to articulate. The law allows a will to be made in any manner ; undoubtedly, therefore, it may be made by interrogatories. Although the deceased intended these answers to be formally extended into a regular will, yet this intention having been defeated by the intervention of death, they must be considered as instructions ; and as such are entitled to the effect and operation of a will.

JUDGMENT.

Sir JOHN NICHOLL.

This paper is certainly very defective in point.

1809.  
*Hilary*  
*Term.*  
GREEN  
v.  
SKIPWORTH  
AND OTHERS.

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Hilary  
Term.

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v.

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AND OTHERS.

of form; but it is intelligible, and is rendered still more so when explained by the circumstances stated.

The objections taken are, *first*, that on the face of it, it is not testamentary.

*Secondly*, that the allegation does not profess such an explanation as would entitle it to probate.

A will made by interrogatories is valid; but undoubtedly wherever a will is so made, the Court must be more upon its guard against importunity (c), more jealous of capacity, and more strict

(c) Swinburne is very full and explicit upon this topic. "The third case is, when he that is at the point of death, and hardly able to speak, so as he may be understood, doth not of his own accord make or declare his testament, but at the interrogation of some other, demanding of him whether he make this person or that his executor, and whether he give such a thing to such a person, answereth, Yea; or, I do so—in which case it is a question of some difficulty whether the testament be good or not; neither can it be answered simply, either negatively or affirmatively, but diversely in divers respects; for if he which did ask the question of the testator, be suspected, or be importunate to have the testator to speak, or do make request to his own commodity; as if he say, Do you make me your executor; or, do you give me this or that? and thereupon the testator answer, Yea. In this case it is to be presumed that the testator did answer yea, rather to deliver himself of the importunity of the demandant, than upon devotion or intent to make his will, &c. &c. &c."

"But if the person that maketh the motion be not any way suspected, and it doth appear withal by some conjectures, that the sick person had a desire to make his will, as if the sick person sent for his friend, who, being come unto him, asketh him whether he make this or that man his executor, which otherwise were to have the administration of his goods if

in requiring proof of spontaneity and volition, than it would be in an ordinary case. But if there is clear capacity, if there is the animus testandi, and if the intention is or may be reduced into writing, the Court must pronounce for it.

The testamentary act, in this instance, originates entirely with the deceased; it is proceeded in by question and answer, on account of the extreme difficulty he experienced in the articulation of his words, and not from any want of volition.

If the facts pleaded shall be proved, they will be sufficient to shew that these answers were intended for instructions; and, in point of law, if a person gives instructions for a will, and dies before the instrument can be formally executed, the instructions will operate as fully as a will itself.

It has been observed, that the act was rather that of the persons by whom the deceased was surrounded, than of the deceased himself. But under the circumstances the precautions used were very proper; the exertions of speaking might have been fatal, and have prevented him from proceeding to express what his intentions were; the resort therefore to question and answer was highly judicious; it was the best practicable mode of collecting his wishes and intentions, as far as he was capable of expressing them, and was adopted with the concurrence of the persons present, as well as of the testator himself.

he died intestate; to whom the sick person answereth, Yea; or, I do make him my executor: in this case the testament is good." Swinburne, Part ii. sec. 5.

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Hilary  
Term.

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v.

SKIPWORTH
AND OTHERS.

1809.

*Hilary
Term.*GREEN
v.SKIPWORTH
AND OTHERS.

For the present, then, assuming, as I am bound to do, that this allegation (*d*) contains an exact representation of the facts, I am of opinion that this paper, as far as it goes, does contain instructions for a will, and therefore if the statement shall be established by proof, the Court must comply with the prayer of the allegation, and grant probate of the paper propounded.

*Easter
Term.*

April 19.

DEVEREUX v. BULLOCK AND BULLOCK BY HIS
GUARDIAN.

Unfinished
instructions
not entitled to
probate.

RICHARD BULLOCK, a merchant and ship-broker, of the City of London, died on the 13th of May, 1806, possessed of personal property exceeding in amount £30,000, and a small (*e*) freehold estate. On the 31st of May, in the same year, the reverend John Bullock, brother of the deceased, and the only next of kin, administered to his effects, as having died intestate; he and a niece (the daughter of another deceased brother) being the only persons entitled to the distribution of his property.

(*d*) This cause came on for hearing in Michaelmas Term, viz. on the 16th of December, 1809, when the facts detailed in the allegation being fully substantiated by the evidence of the several persons who were present during the transaction, the Court decreed the paper propounded to be entitled to probate.

(*e*) About £120 per annum.

The present suit was instituted in 1807, by the reverend John Devereux, who cited Mr. Bullock to shew cause why the letters of administration granted to him should not be revoked; and asserted himself to be a legatee in the following will or testamentary schedule :—

1809.
*Easter
Term.*

DEVEREUX
v.
BULLOCK,
&c. &c.

“ This is the last will and testament of
“ me, Richard Bullock, of Cushion Court,
“ Broad Street, London, merchant. I give
“ and bequeath to the reverend John Doug-
“ las, of Castle Street, Holborn, in the City
“ of London, two thousand pounds bank
“ stock. I give and bequeath to my bro-
“ ther, John Bullock, for and during his
“ natural life, one annuity or clear yearly
“ sum of two hundred pounds, to be issuing
“ and payable out of, and charged, and
“ chargeable upon the long annuities stand-
“ ing in my name in the books of the Go-
“ vernor and Company of the Bank of Eng-
“ land, and to be paid and payable to him
“ when, and as the said long annuities shall
“ become due and payable; and from and
“ after the decease of my said brother, I give
“ and bequeath the said annuity of two hun-
“ dred pounds unto the said John Douglas,
“ his executors, administrators, and assigns,
“ absolutely for ever. I give and devise unto
“ my servant Sarah Robinson, and my god-
“ son Richard Lynott, all those my two free-
“ hold messuages or tenements with the ap-
“ purtenances, situate and being in Cushion-

1809.
 Easter
 Term.
 ~~~~~  
 Devereux  
 v.  
 Bullock,  
 &c. &c.

“ court aforesaid ; to hold to them for and  
 “ during their natural lives, and the life of  
 “ the survivor of them ; and from and after  
 “ the decease of the survivor of them, I give  
 “ and devise my said two messuages or tene-  
 “ ments, with the appurtenances, unto the  
 “ said John Douglas, his heirs and assigns  
 “ for ever. I give and bequeath unto the  
 “ reverend John Devereux, of White Street,  
 “ Moorfields, London, all my interest in the  
 “ lead mines company, or society, held in  
 “ Martin’s Lane, Cannon Street.”

It appeared that the deceased had duly executed two wills ; one on the 18th, the other on the 21st of November, 1799 ; the latter of which continued in existence till within a few weeks of his death ; these instruments were both before the Court in a cancelled state ; the contents of them were nearly similar.

The evidence adduced to give testamentary effect and validity to the paper now propounded was as follows :—

*Mr. ANDREW LEE deposed,*

“ That about the end of March or beginning of April 1806, Mr. Michael Collins, his clerk, being then about to live in the service of Richard Bullock, was, in consequence thereof, several times with the deceased ; and on one day, happening about that time, the deceased sent his will, dated the 21st day of November, 1799, to the deponent, opened and cancelled, by the signature of his name being struck through ;



and the same was so brought by Michael Collins, together with a verbal message to draw or prepare a new will for him ; that being then confined by the gout, and unable to go out, he sent a message back to inform him thereof, and that it was impossible for him to make a new will without proper or further instructions ; and having afterwards, during the time he was so confined by severe indisposition, received many pressing messages to attend the deceased and make his will, he, as soon as he found himself able to go out in a coach, sent a verbal message to the deceased to inform him that he would wait upon him on that day, which was the 5th of May, 1806, if agreeable to the deceased ; and the answer he received to such message was delivered to him verbally by Michael Collins, informing him that Mr. Bullock had been so fatigued by persons calling to see him that day, that he had then composed himself to rest, and would be glad to see the deponent on the next day ; and accordingly on the next day, being the 6th of May, 1806, he went in a coach to the deceased, and was conducted into the bed-room, where he lay confined to his bed by illness ; and he then sat down and conversed with the deceased on several subjects, for some little time ; and the deceased not having in any manner alluded to his desire of having a new will made, and the deponent being rather surprised thereat, as he considered the several messages he had received to attend the said deceased and make a new will for him, came from him, took occasion to mention the subject himself, by asking

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*Easter*  
*Term.*

DEVEREUX  
v.  
BULLOCK  
&c. &c.


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Easter  
Term.

DEVEREUX  
v.  
BULLOCK  
&c. &c.

if he did not wish to have a new will made? to which the deceased answered, he did; and having then given the deponent some instructions verbally, as to the alterations he wished to have made in the disposition of his property; and the deponent having then brought with him the cancelled will, dated the 21st day of November, 1799, immediately proceeded to draw or prepare a new will from the verbal instructions which the deceased then gave him, in respect to such alterations he wished to have made in the disposition of his property by such aforesaid cancelled will, and the deceased having directed that an annuity of £50 should be given to his servant, Sarah Robinson, for and during her natural life, and he having accordingly inserted such bequest in the will he was so preparing, and finding immediately afterwards, from the deceased's own instructions that the said annuity was to be made chargeable on his two freehold messuages or tenements, in Cushion Court; and that a like annuity, chargeable on the same premises, was to be given to the deceased's godson, Richard Lynott; and also that the said two freehold messuages were to be devised to them, the said Sarah Robinson and Richard Lynott for their natural lives, and the life of the survivor of them, he, the deponent, thereupon, of his own accord, and without any directions from the deceased, struck out the legacy or bequest of £50 a year to the said Sarah Robinson, because the said two intended annuities were, as aforesaid, to be charged on the said two freehold messuages, so as aforesaid, intended to be de-

vised to them the said Sarah Robinson and Richard Lynott, and then proceeded in preparing the will from the verbal instructions of the deceased; and having then come down to a legacy or bequest of the interest in the lead mines company or society, held in Martin's Lane, Cannon Street, London, which the deceased directed to be given to the Rev. John Devereux; and the same having accordingly been inserted in such intended will, he directed that Mr. James Williamson and Richard Lynott should be appointed his executors; but not having disposed of the residue of his personal estate, or given any directions respecting the same, the deponent asked him if it was his intention to leave the same to his executors, or that they should take it; and on the deceased answering no, the deponent told him that he must leave some kind of legacy to the said Mr. Williamson, otherwise he would take the residue of his personal estate as it was not disposed of; and the deceased, after some consideration, not having made up his mind as to what legacy should be given to the said Mr. Williamson, or whether he would give any further or other legacies by his intended will, told the deponent to take the papers away with him, meaning the new will, and a copy of the deceased's late brother's will, which he had made Mary Robinson, the daughter of his servant, find for him in the early part of this transaction; and he saith, that to the very best of his recollection he thinks, (but cannot depose thereto with certainty,) that when he had finished writing the will, so far as the deceased gave him instructions, he read the same all over to

1809.  
Easter  
Term.  
  
DEVEREUX  
v.  
BULLOCK,  
&c. &c.

1893.  
*Easter*  
*Term.*  
  
 DAVENPORT  
 v.  
 BULLOCK,  
 &c. &c.

him, but not for the purpose of obtaining his approbation thereof, not thinking it of any consequence till the will should be completed ; but he is certain that the deceased well knew and understood the contents thereof, as he dictated the same, and more especially if the deponent read the same to him, which he really thinks he did, for he, the said deceased, was, during all the time hereinbefore deposed of, of sound, perfect, and disposing mind, memory, and understanding ; and capable of doing any thing requiring thought, judgment and reflection. That when he took the will away with him as directed by the deceased on the 6th of May, the deceased, though evidently desirous of a little time to consider what legacy he should leave to the aforesaid Mr. Williamson, and how he should dispose of the residue of his personal estate, did not, as the deponent recollects, desire him to call again in a few days, or in a short time, that his will might be completed, or to that effect ; for if he had, the deponent would have called on him the very next day for that purpose, whereas he waited, expecting to be sent for, till Saturday the 10th of May ; that he never received any message from the deceased on the subject of his will, or to attend him from the 6th till the 10th of May, for if he had, he should certainly have gone on either of the intervening days, that is to say, on the 7th, 8th, or 9th of that month, for, though he continued weak in his feet, he was not confined to the house, but could go out in a coach. That on the 10th of May he did receive a verbal message as from the deceased (but did not see the messenger,) saying, that Mr. Bullock wished

the deponent to come to him to finish his will, and that his brother was with him, and wished him to come; and accordingly he took a coach and went to the deceased's house, where he saw the Rev. John Bullock, of whom he enquired if his brother was in a competent state to make a will, to which Mr. Bullock answered he was, and the deponent then went up stairs into the deceased's bed-room, where he lay confined to his bed by the illness of which he died; he sat down by the deceased's bed-side, and either Mr. Bullock, or Sarah Robinson the deceased's housekeeper, told the deceased that Mr. Lee was come, upon which, as he lay in bed, he turned his head and looked at the deponent, and then the deponent introduced the subject of his will by asking him if he would choose to leave his niece any thing, or to that effect, but the deceased made no answer but turned his head away again, and did not utter a word during the whole time the deponent remained with him; upon which the deponent, imagining that the deceased did not choose to do any thing further respecting his will at that time, left the room and came away, but he did not imagine that the deceased was at such time incapable of proceeding with his will, as he did not know that he, the deceased, was in the exhausted state of body and mind pleaded and set forth in the fifth article of the allegation, for the deponent did not remain with him so long as a quarter of an hour at the time articulate, and never afterwards saw him; and he says the testator did give, will, dispose, bequeath, and do in all respects as in the said paper-writing marked A. is contained, but he cannot take

1809.  
Easter  
Term.

*Deveraux*  
v.  
BULLOCK;  
&c. &c.

1809.  
Easter  
Term.

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& Co. &c.

upon himself to swear that the deceased never departed from his intentions therein expressed, or that the said deceased would have executed the said paper-writing as his last will and testament had the same been completed even on the next day, because he was a person very changeable, but if it had been completed at the time the deponent wrote the said paper-writing, he does not doubt that the deceased would then have executed it."

SARAH ROBINSON *deposed*,

" That some time in February, 1806, the testator was taken ill of the illness of which he died, and was confined to his room, and very much and almost chiefly to his bed, from that time till his death, though he was occasionally dressed and sat up a little in his room. That one day happening about a fortnight or three weeks before Easter day next before his death, the deceased gave her a key of a box which stood in his room, in which he kept his papers of consequence, and told her to give him thereout a certain paper, which he described to her; and when she had so done, he told her that it was his will, and desired her to take notice of what he was then going to do, and then he run a pen with ink through his name subscribed thereto, and said, there, take notice that I have run my pen through my name, and this will is now no more. I shall make a new will when Mr. Lee can come. And after he had so cancelled his will, he several times sent, (and among others sent the deponent and her daughter) to Mr. Lee's house to enquire how he was, and the answer that was always brought back was that he was extremely ill, and unable to get out, or to that effect.

That on Easter Sunday he complained to the deponent of having found a great alteration in himself for the worse, and expressed a great anxiety for Mr. Lee to come to make his will, and said that he intended to leave the deponent fifty pounds a year, and asked her if she thought that enough, to which she answered, it was ; and he said if she thought it was not enough she should have more ; and he further said, he thought that he should leave his godson, young Lynott, one of the houses in Cushion Court, and that he would leave something to the bishop, meaning the Roman Catholic bishop, the Rev. John Douglas, for the Blind Charity in St. George's Fields ; and about six o'clock in the evening of Easter Sunday he sent the deponent to Mr. Lee's to enquire how he was, and whether he was able to come out ; but the answer was, that Mr. Lee was so bad he was unable to come out or to help himself to any thing ; and again, very late in the said evening, and also in the evening following, the deceased sent the Rev. John Devereux to enquire how Mr. Lee was, and whether he was able to come to him ; but Mr. Lee continued confined by indisposition for some weeks, and was not able to come to the deceased till within a week or ten days before his death, about which time Mr. Lee came in a coach, and was from thence assisted up stairs to the deceased's bed-room ; that, after Mr. Lee had left him, the deceased told the deponent that he had talked to Mr. Lee so long, and was so exhausted, that he could not talk to him any longer, and that Mr. Lee was to come to him the next day,

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&c. &c.

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BULLOCK,
&c. &c.

but that he had taken care of the deponent, or he expressed himself to that effect. That the deceased expecting Mr. Lee daily to come and finish his will for him, expressed great anxiety at finding he did not come, and a messenger was sent every day, after the said day when Mr. Lee came as aforesaid and began to make the said will for the deceased, to know how Mr. Lee was, or information thereof was daily brought to the deceased's house by the clerk or servant of the said Mr. Lee, who used to call to inquire how he was. That, on the Thursday or Friday next before the day on which the deceased died (which happened on a Tuesday, he having become extremely weak and low, and evidently near his dissolution,) the deponent took occasion to mention to the Rev. John Bullock that he had not signed his will, and the Rev. John Bullock thereupon recommended that Mr. Lee should be sent to, and the deponent thereupon sent her daughter for that purpose, who brought back an answer that Mr. Lee was too ill to come out, and Mr. Lee did not come till Saturday, the 10th of May, and he was then shewn into the deceased's bed-room, but he was then so exhausted and weak, that, though he was spoken to, and understood what was said, he was unable scarcely to give any answer, and it was therefore judged improper to proceed with his will, and he continued in that state all that day, and on the next he became speechless, and so continued till he died on the thirteenth of the said month of May, (being Tuesday) without having had sufficient capacity of mind to complete his aforesaid will."

MARY ANN ROBINSON, (the daughter of the preceding witness,) *deposed*,

"That about noon on Thursday the 8th of May, her mother told her to go to Mr. Lee's house and to inform him that the Rev. Mr. Bullock wished him to come to the deceased's house immediately if he was able to come out, but did not say for what purpose he was wanted; accordingly she delivered this message to Mrs. Lee, who returned for answer that Mr. Lee was very ill and unable to come out.

"This witness spoke also to Mr. Lee's chamber on the 10th, and remaining a very short time in the bed-chamber of the deceased, and added that the deceased was during that day in a very weak and exhausted state, notwithstanding which he did in the course of that day speak to the deponent about some money he wished her to carry to the bankers, which she accordingly did."

JOHN LYNOTT *deposed*,

To the deceased's having sent to him during his last illness to ask him to be one of his executors, and to his telling him that he had given instructions for the making of his will, and that he intended to invest a sum of money in the name of the trustees for the use of the Roman Catholic College.

DOROTHY LYNOTT, (wife of the preceding witness,) *deposed*,

To the deceased's expressing to her his wish that her husband should be one of his executors, to his telling her that he had taken care of her little boy, to whom he was godfather, and to the great anxiety the deceased testified for several days pre-

1869.
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Term.

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v.
Buncock,
&c. &c.

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Easter
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BULLOCK,
&c. &c.

ceding his death to see Mr. Lee for the purpose of finishing his will.

Swabey and Adams for the next of kin.

Arnold and Daubeny contra.

JUDGMENT.

SIR JOHN NICHOLL.

The question is whether this paper can be established upon this evidence? it contains mere instructions; it is not complete even as a paper of instructions, for they are only a part of the intended disposition. Such a paper, however, might be established by circumstances; but for this two points are absolutely necessary. *First*, the Court must be completely satisfied that the deceased had finally decided to give these legacies. *Secondly*, that he never abandoned that intention, but was only prevented by the act of God from proceeding to the completion of his will.

If the instructions had been completed, and the drawer only dismissed to prepare a more regular will from them, that would be an act preparatory to execution and a confirmation of his intentions, and consequently would stand on stronger grounds than this case where the instructions have only been proceeded in in part, and the drawer is to return for the purpose of receiving further instructions; for here the whole matter lies open to the re-consideration and revision of the deceased. The perusal of the former part, and the consideration of other bequests, might naturally enough induce a change in the legacies. Unless therefore there was the strongest possible evidence that the intention of the deceased, as far as it went, was

fixed, the Court would not grant probate of a paper of this description. Again, when the deceased stops in the middle, it is a presumption that he did not intend to proceed to execution ; for it is never to be forgotten that the strong presumption of law is against a paper of this nature, and the onus-probandi lies on those who set it up to shew, on the one hand, the full and entire determination of mind on the part of the deceased, and, on the other, the inevitable incapacity which prevented him from executing it.

Does the evidence in the present case satisfy these demands ? Mr. Lee, the drawer of the instructions, was the confidential attorney of the deceased ; his impressions therefore will have great weight in forming the opinion of the Court ; according to his testimony, the anxiety of the deceased was not strong, his heart was not in the transaction when Lee went to him on the 6th of May, the deceased commenced a conversation on other subjects, and made no allusion to his will till Mr. Lee directed his attention to that topic.

The two Robinsons and the two Lynotts indeed say that the deceased expressed great anxiety for the arrival of Lee ; but it is to be observed that these witnesses are disappointed persons, to whom the deceased had always held out hopes of legacies ; their evidence therefore is to be received with caution ; though there is no imputation against them that they speak corruptly, yet they naturally speak under a bias. Mr. Lee is not certain as to reading over the paper to him, he only thinks he did ; he says the deceased hesitated as to the disposi-

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*Easter
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&c. &c.

tion of his residue, as to a bequest to his executor, and also as to whether he should give any further legacies. The conclusion of the instructions was postponed, not because he was exhausted, but because he had not fully made up his mind. This happened on the 6th of May; Mr. Lee received no message again till the 10th, or he should have repeated his visit; and during the interval the deceased was perfectly in a state to have proceeded with his will.

The two Robinsons and two Lynotts say that the deceased was exceedingly anxious to complete his will, that repeated messages were sent to Mr. Lee, but that the answer returned to them was that he was laid up with illness, and unable to come; but all this is at complete variance with the evidence of Mr. Lee himself, who says he was not ill, and that he should certainly have gone to the deceased had he received any message to that effect.

When this inconsistent evidence is produced by the party setting up the paper, on what has the Court to rely? Upon the fact undoubtedly that for four days, though the deceased continued perfectly capable, no further progress was made in this will. On the 10th Mr. Lee received a message as from the deceased, and going to him was informed by his brother, in reply to a question he put to him, that the deceased was sufficiently in a state of capacity to proceed; this is material to shew capacity, as the brother could have no motive for representing him to be in a better state than he really was, for his interests would most probably have been

affected by any will. The deceased is not insensible, he attended to the information given him of Mr. Lee's coming, he turns round and looks at him but says nothing; when Mr. Lee questions him about his will he is not unmindful of it, but he turns away his head, which Mr. Lee attributes not to incapacity but to dislike to proceed.

The other witnesses attempt to account for this behaviour by representing him to be in an exhausted state; but, nevertheless, one of them mentions a fact which shews that he was capable of an act of business, namely, that on that day he had given her money to carry to his bankers.

Here then is not only an omission, but a direct refusal to complete this paper; how is it possible for the Court to support it? how can the Court say that thus far at all events the deceased had decided to dispose of his property? Further, if these legacies were supported by the uniform dispositions of former wills, some weight might be attributed to this circumstance; but it is not so, not one of the bequests is precisely the same in the former wills; they are not supported even by the more recent declaration deposed to by Sarah Robinson, giving her full and entire credit for the accuracy of these declarations.

The character of the deceased has been adverted to; and, if he had been a person uniform, steady, and invariable, in his habits, some reliance might have been placed on this; but the reverse appears to have been the fact, without relying on the declaration spoken to by Sarah Robinson that the deceased was such a shuttle-cock that he promised

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&c. &c.

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&c. &c.

her one moment what he would not do another, it appears from the more satisfactory evidence of Mr. Lee that he was a person of a very changeable mind. How then can the Court say that he had not departed from his intention ; but that his fixed mind and will went along with this paper? In the very course of giving these instructions there are important fluctuations of intention.

From such circumstances the Court could hardly establish any paper which had not received formal execution, without great danger of injuring the rights of the next of kin, to whom, it must be remembered, the law gives the property if there is no testamentary disposition.

In this case, where there are only a few first instructions, and they are not conformable to any former dispositions, nor precisely supported by any recent declarations, where they receive no partial approbation and confirmation as far as they go, the deceased stopping from not having made up his mind as to the rest of his will, making no further appointment with the drawer, and living five days without any further act, and when the drawer did attend him afterwards declining to proceed, the Court can have no difficulty in deciding against this paper, and in decreeing the administration to the Brother and next of kin of the deceased.

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HIGH COURT OF DELEGATES.

Delegates,  
1810.

DEVEREUX v. BULLOCK.

An appeal was interposed to the High Court of Delegates, from the sentence of the Prerogative Court.

The cause came on for hearing on the same evidence as in the Court below, before the Judges Delegates, viz. May 21.

Sir ALAN CHAMBRE, one of the Justices of the Court of Common Pleas.

Sir ROBERT GRAHAM, one of the Barons of the Court of Exchequer.

Sir JOHN BAILEY, one of the Justices of the Court of King's Bench.

Doctors BURNABY,

JENNER,

PHILLIMORE,

and

EDWARDS.

The sentence of the Prerogative Court was affirmed ; but the Delegates gave no costs. May 24.

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1809.  
Easter  
Term.  
April 26.

BEAUMONT V. PERKINS.

An article of  
an allegation  
pleading com-  
parison of  
hand-writing  
by persons who  
had seen the  
deceased  
write; and  
also by persons  
skilled in  
hand-writing  
who had not  
seen him write,  
admitted.

**A**NN Perkins was the testatrix; her will bore date December 9, 1807, and was opposed by Charles Beaumont an executor under a former will; an allegation was given in by him, consisting of fourteen articles, the last of which only was objected to. It pleaded,

“ That the name, Ann Perkins, subscribed  
“ to the pretended last will and testament of  
“ Mr. Perkins, the party deceased, dated  
“ 9th of December 1807, is not the hand-  
“ writing of the said Ann Perkins, and it  
“ is well known or believed not to be of her  
“ hand-writing by divers persons of good  
“ credit and reputation, who have frequently  
“ seen her write and subscribe her name, and  
“ are thereby become well acquainted with  
“ her manner and character of hand-writing  
“ and subscription, and that by a comparison  
“ of the said names Ann Perkins subscribed  
“ to the pretended last will and testament of  
“ the deceased with the names Ann Perkins  
“ set and subscribed by the said Ann Perkins  
“ to the wills respectively bearing date the  
“ 24th of May 1802, 28th of October 1805,  
“ and the 15th of November 1806, and also  
“ with the letter written by the deceased as



“pleaded in the 5th and 6th articles of this  
 “allegation, and with the letter of attorney  
 “pleaded in the 10th article of this allega-  
 “tion ; it evidently appears to persons judges  
 “of hand-writing and fully competent to form  
 “an opinion thereof that the said names Ann  
 “Perkins set and subscribed to the aforesaid  
 “pleaded last will and testament are not of  
 “the hand-writing of the same person who so  
 “subscribed the said wills of the deceased  
 “bearing date as aforesaid and mentioned in  
 “this allegation and wrote the said letter and  
 “subscribed the letter of attorney as herein-  
 “mentioned.”

1809.  
*Easter*  
*Term.*  
 BEAUMONT  
 v.  
 PERKINS.

*Arnold and Edwards against the admission of this article.*

The depositions of persons skilled in hand-writing who are to judge of the signature of this will by a comparison of it with other signatures of the deceased cannot be considered as evidence, because they would be evidence of opinion only and not of facts. We know by tradition in the Ecclesiastical Courts, that when the Court has found it necessary to form an opinion as to hand-writing, it has, for the purpose of assisting its own judgment, invoked the aid of the registrars of this and of other Courts ; a mode infinitely preferable to the one proposed in this plea, because the registrars, from their office, may be supposed to be conversant in hand-writing ; and their opinion thus taken will not assume the character of evidence. True it is that evidence of this description has been admitted

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Term.

~~~~~  
BRAUMONT
v.
PERKINS.

as in the case of *Reilly v. Rivett (a)*, but it was held entitled to very little weight ; at all events it is that which cannot weigh against other evidence ; and, if it is not to be considered as entirely inadmissible, still the Court will not receive it where it has other proofs, from which it can deduce its conclusions ; or in any case where it is not absolutely necessary. Here there is no necessity ; because it is directly pleaded in a preceding

(a) *Reilly v. Rivett, Prerog.* 28th July, 1792.

In the 10th article of an allegation, it was pleaded, " that a paper of instructions exhibited in the cause was, in the opinion of persons skilled in handwriting, written in a studied and fabricated hand, and not in the natural hand of any person, &c. and also that it appeared to be written by the same person who had written the memorandum at the bottom of the paper."

This was objected to, as extending the doctrine of comparison of handwriting farther than it had yet been carried, viz. to produce evidence to shew that it could not be the handwriting of any person whatever.

JUDGMENT.

Sir WILLIAM WYNNE.

I do not think so ; I conceive it possible for persons conversant in handwriting to distinguish a studied from a real hand, and to give a satisfactory opinion on such a point. Comparison of hand has always been admitted in the Ecclesiastical Courts in different ways ; the old way was to refer it to the officers of the Court ; in *White v. Terry and Longmore*, before Sir George Hay, in 1774, the Court referred to the deputy registrars of the Admiralty and the Consistory of London for their opinion as to handwriting.

It is observable also that it has been admitted in this very cause in the Court of King's Bench ; but this Court does not want such a precedent.

The article was admitted.

article that the name subscribed to the will is not in the handwriting of the deceased, and thus the attention of the Court is directly called to the fact, and it may be proved by witnesses.

Adams and Jenner contra.

The objection taken that this article does not plead a fact, but opinion as to a fact, would apply to all evidence of handwriting, which at any time is only the evidence of opinion and belief; for, where witnesses speak to their knowledge of the handwriting of any person from having seen him write on a former occasion, they only speak to their opinion founded on that fact. It has always been the practice of the Ecclesiastical Courts to admit this species of evidence. *Riley v. Rivett* is not the only case; the same point was decided in *Hewett v. Moore* and in many others.

Persons, whose business renders them conversant with handwriting, and who are consequently in the habit of applying their attention frequently and with great particularity to the subject, can form a more satisfactory opinion as to the similitude or dissimilitude of handwriting than either the Court or the registrars, and may materially assist in relieving the Court from much painful responsibility.

JUDGMENT.

Sir JOHN NICHOLL.

I do not understand that any objection has been taken to the first part of this article; but only to that part of it which pleads that, on a comparison of the subscription to this will with the deceased's subscription to other wills and to a power of attorney, it appears to judges of handwriting not to be

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the subscription of the same person : and this is introduced for the purpose of laying before the Court the opinion of persons skilled in comparison of handwriting.

The question is not what the effect of this evidence may be, but whether it is admissible? It is not denied that such evidence has been admitted ; indeed no case has been suggested on which it has ever been rejected ; the Court is not at liberty to refuse it from any present opinion it may entertain of the little effect it may ultimately produce ; one sees no ground for rejecting absolutely evidence of this sort. It has been truly said that all evidence of handwriting is evidence of opinion ; if a person has seen another write twenty years ago, he can only form his belief as to his writing by a comparison with what he once saw : what is this but evidence of opinion ? it is not suggested that the comparison should not be made, but it is said the Court may make it ; the Court, however, may not feel itself competent to the task ; to this it is replied that then it may refer the matter to registrars as was done in the case of *Heath v. Watts (b)* ; but,

(b) *Heath v. Watts. Prerog. June 27, 1798.*

Five witnesses were examined to handwriting ; two (and one of these a clerk at the Bank,) deposed that they believed the signature of the will was not in the handwriting of the deceased, one believed it to be his handwriting, and two could form no opinion on the subject.

The Court directed the deputy registrars of the Admiralty, the Arches, and of the Prerogative Courts, to inspect several signatures of the deceased, and also two exhibits of considerable length in his handwriting which had been produced in the cause, and to compare them with the signature to the will, and

what is this but evidence of comparison and opinion?

In other Courts resort is often had to the evidence of persons skilled in any particular art; I see no ground for rejecting this; in general there is better evidence than that of handwriting on which the Court can form its opinion; but it may be adminicular to that evidence.

The instruments by which the comparison is to be made must be very strictly proved.

The article was admitted.

to report their opinion after such comparison; which they accordingly did, and reported that they had examined very many signatures (viz. 45) of the deceased in the books of the Bank, and were of opinion that neither those signatures nor the two exhibits before the Court were written by the same person who had signed the will.

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Term.BEAUMONT
v.
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*In the goods of CHARLES JAMES NAPIER,
Esq. heretofore supposed to be dead.*

1809.

Easter
Term,
May 3.

IN the month of February last probate of the last will and testament of Charles James Napier, Esq. was granted to Richard Napier, Esq. as the brother and sole executor named in the said will, Richard Napier having first made an affidavit in which he deposed that he had received intelligence, which he believed to be correct, that the said Charles

1809.
Easter
Term.



James Napier had been (a) killed in an engagement with his majesty's enemies at Corunna (a) in Spain, on the 16th of January last.

On this day, Bogg, proctor for Richard Napier, on the behalf of his party, voluntarily brought in and left in the registry of the Court the said probate; and the Judge, on the motion of counsel, by an interlocutory decree, revoked the probate so as aforesaid granted in error, and declared the same to be null and void to all intents and purposes whatsoever in the law. At the same time Charles James Napier appeared personally; and the judge, at his petition, decreed the original will together with the probate, being first cancelled, to be delivered out of the registry to him or the said Bogg for his use.

(a) He was left for dead on the field of battle; and reported in the dispatches of Sir John Hope to be amongst the number of the slain.

See London Gazette, Jan. 24, 1809.

1809.
Trinity
Term.
July 3.

WHITE v. DRIVER.

A lucid interval
established.

ELIZABETH MANNING died on the 26th of January, 1805, at the house of Mr. Driver, at Chadwell, in Essex; the only relations who survived her were two sisters and a nephew and niece, the children of a deceased brother: her will bore date the day immediately preceding her death; her pro-

perty was bequeathed in thirds, one third to the nephew, another to the niece, and the remaining third to their mother the widow of her brother, who since his death had intermarried with Mr. Driver. The will purported to be signed and executed in the presence of three witnesses.

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Term.
~
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v.
DRIVER.

The two sisters impeached the validity of this instrument on the ground of the insanity of the testatrix.

Many witnesses were examined who deposed to the childish and extravagant conduct of the deceased at several periods of her life. In 1801, she had been found in the parish of St. John's, Hackney, and taken to the workhouse there where she had been confined several weeks and treated as an insane person. It was in evidence also that in Dec. 1804, the persons who resided in the immediate neighbourhood of Peacock Street, Kennington Road, where she and a sister (who was in the same weak and insane state as the testatrix,) then lived, considering themselves and their property in danger of fire from the incapacity and childishness of these two women, lodged a complaint against them to the parish officers, who on the 17th of November conveyed them both to the workhouse at Newington.

MARY CROSSLAND *deposed.*

“ That during the time the party deceased remained under her care, viz. *from the 17th of December, 1804, to the 21st of January, 1805,* she was constantly treated by her and her assistants as an insane or mad person, that she behaved with so much violence as to render it necessary for a straight waistcoat to be put upon her.”

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This witness also expressed her belief, " that,  
 " from the weak and childish state of the deceased,  
 " she was not on the 21st of January 1805 capa-  
 " ble of knowing with whom or where she was  
 " going, and that she was wholly incapable of un-  
 " derstanding any question that might be put to  
 " her by any person whatsoever."

On the other side.

LEONARD LAZENBY, *a clerk in the Bank, deposed,*  
 " That, on the 21st of January, 1805, the de-  
 " ceased came to him at the Bank for some money  
 " which she had left at three different times in his  
 " hands, having said that she would come to him  
 " again respecting the laying out of the same for  
 " her; but, as he understood, she had been pre-  
 " vented by illness from so doing; she was ac-  
 " companied by Mrs. Driver and a young woman;  
 " she looked as if she had been very ill which she  
 " said she had been, and she told the deponent she  
 " wanted her money as she was going into Essex  
 " with her relations to try if she could get better;  
 " he gave her a draft for £40, being the exact  
 " sum due to her, which is dated the 21st of Ja-  
 " nuary, and it was duly presented and paid; she  
 " appeared to him of perfect sound mind, other-  
 " wise he would not have paid her the money."

Mr. WILLIAMS, *the curate of Chadwell, deposed,*  
 " That on the 23d of January, 1805, he was  
 " sent for to administer the sacrament to the de-  
 " ceased, and to pray by her, that he saw her  
 " daily from that time till her death, and that he  
 " recommended to her to settle her worldly affairs  
 " and make her will."

The apothecary who attended her during her



last illness, the attorney who drew the will, and the three witnesses who attested the execution of it, all deposed strongly to her capacity.

*Arnold and Swabey for the Executors*, contended that the deceased had a testamentary capacity at the period when the will was executed, and they cited the case of *Cartwright v. Cartwright*.<sup>(a)</sup> Deleg. 1795.

*Jenner and Phillimore for the sisters*, insisted that the proof was not equal to the exigencies of the case, that insanity having been established the law imposed upon the adverse party the burthen of proving a lucid interval by the clearest and most incontrovertible evidence. They laid stress on the character and quality of the deceased's mind, which in its best days was weak and feeble and of so inferior a cast that after it became entirely worn out and exhausted there could be but little probability that it should again ever recover the use of its rational powers.

#### JUDGMENT.

Sir JOHN NICHOLL,

(after recapitulating the evidence.)

The evidence in this case sufficiently establishes that the deceased had been at times subject to insanity for several years preceding her death, and even down to the 21st of January 1805, only four days prior to the execution of the will in question; but it does not appear that the disorder was uniform, or always attacked her with an equal degree of violence; she was at large the greater part of

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(a) See the next case.

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*Term.*

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her life, and had the management and dominion of herself and her actions. She seems to have had violent accessions of the disorder in the years 1793 and 1794, in 1801, and again in 1804; the evidence, however, does not preclude the proof of lucid intervals, although it raises a strong presumption against sanity: for I agree with the counsel for the next of kin that, wherever previous insanity is proved, the burthen of proof is shifted, and it lies on those who set up the will to adduce satisfactory proof of sanity at the time the act was done.

It is scarcely possible indeed to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognises acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact.

In this case the deceased had been subject not only to eccentricities but to delusion and derangement at different periods for several years, but it was not continuous; she was not under confinement; she managed her own affairs; she earned her own livelihood; when she came out of the workhouse on the 21st of January she acted immediately, and continued to act from that moment till her death, as a sane and rational person. There is no indication of any fraud or circumvention in procuring this will, or even in suggesting it to her; a desire to make a will is not with her an insane topic; it is recommended very properly to her by the clergyman who was sent for to pray by her, and the intention of making it was first communi-

cated by the deceased to an old acquaintance of hers of the name of Turner ; the utmost possible precaution was used by Turner in carrying her wishes into effect, by securing the attendance of an attorney, two medical gentlemen, and the clergyman.

The deceased herself declares and directs the disposition of her property : the disposition itself is neither insane nor unnatural ; two thirds are left to the children of a deceased brother, and the remaining third to his widow and her second husband, and these two persons are appointed her executors : her sisters, it is true, are excluded ; but they were both married, and possibly had no great claims on her.

The Court has the concurrent opinion of these several persons, viz. Mr. Turner the deceased friend, Mr. Williams the clergyman, the solicitor, the two apothecaries, and the nurse, and that too with all their suspicions awakened, and their vigilant observation called forth that the deceased was perfectly sane and rational throughout the whole period of the transaction ; some of them also prove that she was equally sane and rational a day or two before, and continued so till her death on the subsequent day.

Notwithstanding, therefore, all the jealousy which the Court should feel as to the act of a person once proved to have been insane, still under this evidence it is impossible not to concur with these witnesses in opinion that the deceased was of sound mind ; and, consequently, I am bound to pronounce for the validity of her will.

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*Feb. 23.*

DAME BYZANTIA CLERKE, heretofore CARTWRIGHT,  
 and CARTWRIGHT v. CARTWRIGHT and others. (a)

A lucid in-  
 terval esta-  
 blished.

JUDGMENT.

Sir WILLIAM WYNNE.

The question in this cause arises upon the will of Mrs. Armyne Cartwright deceased, which has been opposed and propounded on behalf of the contending parties.

The will is on all sides admitted to be in the handwriting of the deceased; and it is in these words.

“ Wigmore Street, August 14, 1775. I  
 “ leave all my fortune to my nieces, the  
 “ daughters of my late brother Thomas Cart-  
 “ wright, Esq. except £100 each to my ex-  
 “ ecutors, and one year’s wages to my serv-  
 “ ants and mourning. I appoint Mrs. Mary  
 “ Catherine Cartwright my nieces’ mother,  
 “ and Thomas George Skipwith, Esq. of

(a) The Editor esteems himself singularly fortunate in being enabled to lay before his readers a full and correct report of the judgment of the Court of Prerogative in this remarkable case: the high authority of the decision, and the frequent reference which is made to it in the Court of Probate, will, he apprehends, render such a report extremely valuable; and he trusts he shall be justified in having thought it more advisable to insert it in this place, though in violation of chronological arrangement, than to have printed it separately in an appendix.

“ Newbold Revel in Warwickshire, my ex-  
 “ ecutors, and trustees for my nieces until  
 “ they come of age or marry ; if any of them  
 “ should die sooner their share to go to the  
 “ survivors or survivor.

“ ARMYNE CARTWRIGHT.”

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It appears to have been inclosed and sealed up in a cover ; and upon the back of the cover, is written in the handwriting of the deceased, “ This is my will. A. Cartwright.” The will is written in a remarkably fair hand, and without a blot or mistake in a single word or letter. Pleas have been given in on both sides, and there is a pretty full account of the family and connections of the deceased, and her affections, and I think it clearly appears the will is as proper and natural as she could have made, and it is likewise as conformable to her affections at the time. It appears her father was twice married ; the issue of the first marriage was Thomas Cartwright and herself ; the issue of the second was William Cartwright and his brother and sisters, who are the other parties in this cause. It appears that the mother of the deceased (the first wife of her father,) was a lady of considerable fortune ; and that he, in consequence of that fortune, made a very large settlement upon the younger children of that marriage to the amount of £20,000, which was the bulk of the deceased's fortune, she being the youngest issue of that marriage, the whole of it vested in her ; and the effect of the will is to give this fortune, which the father gave to the younger children of his first marriage, to the younger children of her brother who was

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the heir of the estates. It seems that £200 a year interest for part of this was paid to her by the steward of those estates, and something more was upon bond from her brother. In respect to the affection she had for the several branches of the family, it appears by some persons, particularly Lord and Lady Macclesfield and another lady (Miss Heathcote), that the deceased was particularly attached to her brother and his family. The account is this, Lord Macclesfield says, " he had been bred up in " habits of friendship and intimacy with her from " the early part of her life ;" and he says, " judg- " ing from the general tenor of her expressions and " conversation, she was by no means pleased with " her father's second marriage ; and he never heard " her express one word of affection for her mother- " in-law or any of the children by such marriage ; " and that on the occasion of the death of Sir Cle- " ment Cottrell Dormer, the father of her said mo- " ther-in-law, she expressed to this deponent a very " great displeasure at her father's obliging her to " put on mourning, and said Sir Clement was no re- " lation of her's. That she upon all occasions ex- " pressed the greatest affection for Thomas Cart- " wright, Esq. her brother by the whole blood and " his children, and the general tenor of her expres- " sions and conversations were such as convinced the " deponent she always had a very strong attachment " to and predilection for her said brother by the " whole blood and his said wife and children beyond " that she had to and entertained for her said mother- " in-law and brothers and sisters by the half blood." To the same effect exactly Lady Macclesfield speaks ; she says, " that her conversation and conduct were

“ such as shewed and strongly impressed on the  
 “ mind of the deponent a belief that she considered  
 “ her brother by the whole blood as much nearer and  
 “ dearer relation than her brothers and sisters by the  
 “ half blood.” And they speak to what the gentlemen have called for ; for it has been said the affection of the deceased and her attachment was confined first to her father and afterwards to her brother ; but what these two noble persons have been speaking positively to, is the predilection there was for the children of her brother above her half brothers and sisters. It does not rest upon this ; they have proved, and what to be sure is natural, her dissatisfaction at her father’s second marriage, and that she was at that time a young lady grown up, was displeased at that marriage. It very clearly appears however as to a personal disgust, if any there were, that it was at that time entirely got over ; for I think the conduct of Mrs. Cartwright appears to have been perfectly good as could possibly be, and she seems to have gained her confidence by her attention to her during her unhappy malady, which was affectionate and proper. It is said that she had an affection for her half brothers and sisters ; but I see nothing of that ; I see no visits made by the brothers and sisters at the time she separated from the father’s family and had an establishment of her own : it is proved that the other children did visit her, and that they dined with her, and that she treated them with a great deal of attention, and was fond of them, a thing very uncommon with her in regard to children, as it seems she was by no means partial to children ; and I think it is

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most completely established there was a great predilection for the children of her brother Thomas Cartwright than for her brothers and sisters by the half blood. The evidence in support of the will rests upon full proof that it is the handwriting of the deceased which is not at all denied, and on a recognition by the deceased which I shall come to by and by. It was pointed out and urged as a sort of complaint, as if there was something artful in the mode of pleading, and as something not altogether right in the conduct of the cause, in not having examined to the factum of the will the only person capable of giving any account of the manner in which it was actually obtained; but I do not see there is any ground for that complaint; I do see, I think, from what appears from the evidence of this person, there was strong reason for the parties who propound this will not to have thought fit to examine that person; they were not called upon to do it; it is not like a subscribing witness to a will, though I have known that not done. If you have a mind to interrogate the witness, you may call upon the party to produce the witness to be examined upon interrogatories; they must produce the witnesses to submit to interrogatories if called upon, though they are not bound to do it without; and certainly it is not a complaint for the party to make who has produced and examined this very witness, and on her examination obtained an account as to the factum. The only witness then that has given any kind of account of the writing of the will is Charity Thom, who was present at the time; there was another witness of



the name of Gore, but she is dead ; therefore Charity Thom is the only person who can give any account of what passed ; and the account she gives is extremely material ; for I cannot agree with what was said by Dr. Nicholl, that this will relies entirely upon the face of the will itself, and upon the evidence of Mrs. Cottrell, and the proof of handwriting, for its support. I think the evidence of Charity Thom goes very materially to support it ; her evidence is in these words ; she says to the 15th and 16th articles of the first allegation ; “ That whilst the said Dr. Battie visited “ and attended the said deceased, he desired the “ nurse and the deponent and her other servants to “ prevent her from reading or writing, as he gave it “ as his opinion that reading and writing might disturb and hurt her head ; and in consequence “ thereof she the said deceased was for some time “ kept from the use of books, pens, ink, and paper ; “ that, however, sometime prior to the writing the “ will in question in this cause, but precisely as to “ time the deponent cannot speak, she the said deceased grew very importunate for the use of pen ink and paper, and frequently asked for it in a very clamorous manner ; that Dr. Battie endeavoured to dissuade and pacify her, and told her that whatever she wrote he must appear as a witness against, but that if she would wait till she got well he would be a witness for her ; that the said deceased continuing importunate in her desire to have pen ink and paper, the said Dr. Battie in order to quiet and gratify her consented that she should have them, telling the deponent and Elizabeth Gore the nurse

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“ that it did not signify what she might write as she  
“ was not fit to make any proper use of pen ink and  
“ paper ; that as soon as Dr. Battie had given his per-  
“ mission that she should have pen ink and paper the  
“ same were carried to her, and her hands which had  
“ been for some time before kept constantly tied were  
“ let loose, and she the said deceased sat down at her  
“ bureau and desired this deponent and the nurse to  
“ leave her alone while she wrote, and they to hu-  
“ mour her went into the adjoining room, but stood  
“ by the door thereof so as they could watch and see  
“ the said deceased as well as if they had been in the  
“ same room with her ; that the said deceased at  
“ first wrote upon several pieces of paper, and got  
“ up in a wild and furious manner and tore the same  
“ and went to the fireplace and threw the pieces in  
“ the grate one after the other, and after walking up  
“ and down the room many times in a wild and dis-  
“ ordered manner, muttering or speaking to herself,  
“ she wrote as the deponent believes the paper which  
“ is the will in question ; but the deponent further  
“ saith that at the time now deposed to the said de-  
“ ceased had not shewn any symptoms whatever of  
“ recovery from her disorder, and in the deponent’s  
“ opinion she had not then sufficient capacity to be  
“ able to comprehend or recollect the state of her-  
“ self her family or her affairs, and during the time  
“ she was occupied in writing which was upwards  
“ of an hour she by her manner and gestures shew-  
“ ed many signs of a disordered mind and insa-  
“ nity.” She says to the 25th interrogatory, “ that  
“ the deceased was occupied upwards of an hour,  
“ nearly two hours as well as the deponent can

" at this distance of time recollect, in making the  
 " will in question, that is from the time of the pen  
 " ink and paper being given her until she left off  
 " writing ; that the respondent and Elizabeth Gore  
 " the nurse went out of the room into the adjoining  
 " room, and left the said deceased alone in the room  
 " but not out of their sight ; that she said she was  
 " going to write, but the respondent does not recol-  
 " lect whether she said she was going to make her  
 " will, but the respondent understood that she was  
 " writing a will ; that when the said deceased was  
 " left in the room by herself she was so agitated and  
 " furious that the respondent was very fearful she  
 " would attempt some mischief to herself, but she  
 " did not do any ; that a candle was given to the said  
 " deceased to seal what she had written, but the re-  
 " spondent cannot recollect what length of time the  
 " candle was by her ; that the respondent and also  
 " the nurse were always cautious of trusting a can-  
 " dle near the said deceased, but on this occasion  
 " they did permit her to have a candle notwithstand-  
 " ing she shewed many marks of derangement and  
 " insanity at the time, this respondent and the nurse  
 " being at hand and watching her to prevent any  
 " mischief ; that the said deceased seemed very ear-  
 " nest in what she was about, but by no means  
 " closely settled, as whilst she was writing she fre-  
 " quently started up and walked up and down the  
 " room in an agitated manner ; that it was not cus-  
 " tomary to untie the said deceased's hands, or to  
 " leave her alone when she desired it, at times when  
 " she was greatly agitated and disordered, although  
 " sometimes in consequence of her earnest intreaties

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" the respondent and the nurse would untie her for  
" a little, and on the occasion now particularly de-  
" posed to she was so untied in consequence of the  
" permission which Dr. Battie had given her to have  
" pen ink and paper, but she was not left alone, as  
" the deponent and the nurse stood at the door of an  
" adjoining room behind the said deceased, but not  
" above two or three yards distant from the bureau  
" where she sat to write."

The fact then, as it appears by the evidence of this witness, is, that the paper was written by the testatrix herself, no other person being present but the witness who gives the account and Elizabeth Gore who is since dead, neither of whom gave her any manner of assistance ; and she tells you, that the deceased having first of all shewn great eagerness and anxiety for pen ink and paper did write this will the moment she obtained them without any assistance from any one ; but it is said that the condition of the deceased at this time was such that she was utterly incapable of doing that or any other legal act, because it must be rational. They have certainly completely proved that the deceased was early afflicted with the disorder of her mind, I think about the year 1759, and she continued under the influence of that disorder pretty near two years, and after that she returned to her father's house being supposed to be perfectly recovered, and that she continued to reside there from that time to his death ; that after that being in possession of her fortune she went about the year 1768 to housekeeping herself, and continued so to do as a rational person till 1774, and in the month of

November in that year she went on a visit to her relation lord Macclesfield at Shirburn in Oxfordshire, and continued at his house about three weeks; that on the 26th of November she returned to London in a disordered and disturbed state; at first she was attended by a physician Dr. Fothergill, who found it was a disorder of the mind, and what he had not directed his attention or study to. It is proved that in the latter end of January or beginning of February 1775 Dr. Battie was called in, and he treated her as an insane person, and sent a nurse to take care of her in the way they always do send nurses to patients disordered in mind. In general her habit and condition of body and her manner for several months before the date of the will was that of a person afflicted with many of the worst symptoms of that dreadful disorder, and continued so certainly after making the will, which was the 14th of August 1775. They have certainly made out that. Now what is the legal effect of such a proof as this? Certainly not wholly to incapacitate such a person, and to say a person who is proved to be in such a way was totally and necessarily incapacitated from making a legal will. I take it the rule of the law of England is the rule of the civil law as laid down in the second book of the Institutes, (a) "*furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.*" There is no kind of doubt of it, and it

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(a) Instit. lib. 2. tit. 12. sec. 2.

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has been admitted that is the principle. If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent like all human creatures was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it; that is the law; so that in all these cases the question is whether, admitting habitual insanity, there was a lucid interval or not to do the act. Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done the whole case is proved. What can you do more to establish the act? because, suppose you are able to shew the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne does state it to be so. The manner he

has laid it down is, (it is in the (a) part in which he treats of what persons may make a will) says he, the last observation is, "If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good, yea although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose that if the testament be wisely and orderly framed the same ought to be accepted for a lawful testament." Unquestionably there must be a complete and absolute proof the party who had so formed it did it without any assistance. If the fact be so that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month; I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended; I look upon it if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time,

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that is completely sufficient. What does appear to be the case from the evidence of these witnesses? As to Charity Thom, who seems to me to be principal witness, she gives an opinion of her own, and that opinion is against the validity of the act, and she expressly says over and over that the deceased at the time this was done was not sane and was not capable of knowing what she did; that is the result of her evidence. The Court however does not depend upon the opinion of witnesses, but upon the facts to which they depose. All the facts which are deposed to (it does appear to me) are sane; the witnesses' opinion arising from her observations does not give any foundation at all for saying the testatrix was insane at the time of making the will; her opinion that the deceased was insane at such time was founded on bodily affections which were extraneous. What is the fact? she says that the deceased whilst employed about the act rose frequently and walked backwards and forwards about the room, that she did not set down closely to the business, that she started up, and that she tore several papers and threw the pieces into the grate, then wrote others, and did not appear to her to act in such a way as a person who was calm would do. In my apprehension, it appears from this account her manner of doing it was this: she wrote several papers, and if she saw any mistake however trifling she was dissatisfied and probably vexed she did not write in such a way as fairly to answer her own intention; the paper itself has no mark of irritation; a more steady performance I never saw in

my life ; and it seems hardly consistent that a person wild and furious and in such a degree of insanity as she is stated to be should write in such a way. It seems to me a very extraordinary thing, but whatever outward appearance there was it had no effect on the writing itself ; she has wrote it without a single mistake or blot or any thing like it. What is the construction ? that she was endeavouring to write her will, which she had taken a determination to do ; that she made mistakes and destroyed those papers in which she had made them, that she knew how to correct them, and did correct them, and at length wrote and finished as complete a paper as any person in England could have done. Is this insanity ? In my apprehension, it is not ; it seems to me she was vexed at her mistakes, which I think shews that she had at that time her senses about her, and I think it appears likewise she was not then in fact in the disturbed condition she was before and after. They say they were generally forced to keep the strait waistcoat upon her, that even then she would thrust out her arms if she could, and strive to thrust her fingers in their eyes, and in short do every thing that would do mischief. Is there any mischief in the present case when the strait waistcoat is taken off ? Nothing like it ; as soon as it is taken off she says, " Give me pen ink and paper ; " and when it is given her she says, " Leave me, for I am going to write ; " and they go out of the room ; she is not disturbed at their watching her, but pursues her own intention and completes the paper ; she enquires the day of the month, and an almanack

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is given to her by one of the nurses who was watching her, and the day of the month was pointed out to her; she then calls for a candle; and they say they used to be cautious not to trust her with a candle, and were forced to hold it at a distance from her if she read the newspaper; but still in this case they give her a candle that she may use it in order to seal the paper; no harm was done of any kind, and none attempted; every thing that was done was for the purpose of completing the act; and am I to conclude she was insane, because she might have bodily affections, irritations of nerves, when every thing which was rational is done, and as collectedly and as exactly as any person of the clearest sense would have done, and of her own head entirely. The gentlemen have said all this is mere form. Is it mere form that a person so situated as she was should of her own accord write a will containing the most rational disposition of her property, leaving all her fortune to her nieces the daughters of her deceased brother who were the most natural to her, omitting her nephew who was possessed of a large fortune? Is it mere form that she should appoint for her executors and trustees the mother of those nieces, and her nearest relation by the father's side, describing accurately the place where he lived, and that she should create a survivorship amongst them if any should die before twenty-one. Is this only form? It is the very essential part and substance of a will, and that will as rational a will as she or any other person could have made. Therefore, taking the fact to be that it was done

of her own accord, it leaves nothing to be proved; that being established puts the matter beyond all possibility of doubt, and I think there can be no question but that she had a legal capacity; but, say they, we can hardly admit this is quite such a paper as it appears, and that it is the mere spontaneous act of the testatrix herself; they surmise, and to be sure it is as groundless a surmise in point of evidence as possible, that it was done at the suggestion of Mrs. Cottrell, but it appears that she was at that time out of town and had been so for a month before; but is the Court to suppose that without evidence, and is there any thing to support it? certainly not, and I cannot presume any such thing. If you have a mind to prove this was by the suggestion of Mrs. Cottrell, you may; if you do not, I must take it to be, what appears from the evidence, the pure and spontaneous act of the party herself, and that Mrs. Cottrell knew nothing of it till she was informed of it.

I do think the remaining part of the evidence is of no very material avail, for I am perfectly persuaded myself the will having been designed by the deceased herself, and made written and delivered in the manner it was, that would have been sufficient to have established an interval of reason if there had been no other evidence; but that is not all, for there are various instances which in my apprehension shew that this unhappy lady had frequent instances of rational capacity. The first and the strongest is that conversation with Mrs. Cottrell, in October, 1775. It was a conversation that Mrs. Cottrell had with the deceased respecting her

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daughters, when Mrs. Cottrell observed to the deceased that a suit in Chancery had been decided against them, and uttered something of a dissatisfied expression which is not unlikely to fall from a fond mother, "That it appeared as if they were destined to lose every thing." I think it was a just and well founded observation of the King's advocate (a) that even the fact of entering into a conversation of this kind is a proof that she at that time must be considered as being capable of holding the conversation, for otherwise she could not have done it; the manner in which that conversation was introduced has been mentioned, namely, the misfortune that had befallen the daughters of Mrs. Cottrell; she says, "the deceased made some reply which the deponent not perfectly understanding she requested the deceased to repeat, and the said deceased then said 'she had done all she could for the deponent's children;' and upon the deponent's asking her what she had done, she repeated she had done all she could for the deponent's children. Upon which Mrs. Cottrell said, (if that part of her testimony be true, which I have no manner of reason to disbelieve,) 'what have you done Miss Cartwright; you have not made a will, have you?' or words to that effect; and the said deceased replied, 'Yes, I have.' And she called to the servant, Charity Thom, to bring the will; accordingly it was brought; and then Mrs. Cottrell says, 'Who are the witnesses;' and the deceased said 'There was no need of witnesses,

(a) Sir William Scott.

for her estate was personal, and the will was all in her own handwriting,' or words to that effect; that the deponent asked her 'if she was sure there was no need of witnesses;' and the deceased immediately made answer 'Yes, I am sure of it, my estate is all personal, and the will is in my own handwriting;' and that the deceased then delivered the will to Mrs. Cottrell; and upon her expressing some hesitation in receiving it, the testatrix desired and pressed upon her to receive the same."

If this be true, it is impossible for any body to act in a more rational manner, with a perfect recollection of what she had done, and a perfect knowledge of what was necessary in order to make it a valid act; she knew better than Mrs. Cottrell did, and it is impossible I think to doubt whether she had a rational interval or not; whatever the length of it might be it was sufficient to enable her to hold a rational conversation, which is made more material, being coupled with the delivery of the will. Mrs. Cottrell, the lady who gives the account of this conversation, is very nearly connected indeed with the parties interested under the paper, being their mother, and feeling as every parent must feel for the interests of her children, cannot be presumed to depose but under some degree of bias, and notwithstanding her rank and situation in life it is very material for the Court to enquire how she is supported. I myself confess that I conceive her evidence to be perfectly proper in every respect; but, prejudiced as she must be supposed to be in favour of the parties interested under the will, it is extremely to be desired, and

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the Court does always require further evidence where it can be had from persons that have not the same prejudice. Mrs. Cottrell has mentioned expressly that Charity Thom was present at the time of this conversation, and that she was the person who was called upon by the deceased to deliver the paper. I do not observe that that particular fact of her being called upon to bring the will is interrogated to ; but the other fact of the deceased having desired Mrs. Cottrell to take the will is put as an interrogatory to the witness, and in answer to that she says "she does not remember any thing of that kind passing." A good deal of observation has passed in respect to the credit of this witness, and there is one part of her evidence which I do think so highly improbable it does seem to throw some degree of discredit upon her testimony, it is that part respecting Mrs. Elizabeth Cartwright ; Mrs. Elizabeth Cartwright in answer to the 16th interrogatory says, "after her coming to town in October, 1775 ; but when in particular she cannot set forth ; she this respondent was informed by Charity Gould the deceased's attendant, and her nurse Elizabeth Gore, that the said deceased had written a will, and that Dr. Bat- tie had declared to the said deceased he would be against it, for that she was not fit to make a will." And to the 23rd interrogatory she says, "she apprehends it must have been shortly after she came to London, in October, 1775 ;" then putting it in the same way she says "she heard from Charity Gould or Elizabeth Gore that the deceased had made a will."

Now Charity Thom in her answer to the 26th interrogatory says, " That she may have mentioned the circumstance of the said deceased having written the aforesaid paper to the interrogate Elizabeth Cartwright, but that she has not any recollection of her having so done, nor has she any knowledge by whom or at what time the said Mrs. Cartwright was informed thereof, and she cannot possibly depose whether the said circumstance did or did not come to the knowledge of the said Mrs. Cartwright or any of her branch of the family prior to the year 1777."

Now though I think it is not improbable that it may have escaped the memory of the witness whether she herself told Mrs. Cartwright, yet that she should find herself not able to depose whether this came to the knowledge of Mrs. Cartwright before 1777 is extremely odd, it being clear from Mrs. Cartwright's evidence that upon her coming to town there was so much conversation respecting the will with this witness; and yet for her to depose in this way, that she cannot possibly say whether Mrs. Cartwright knew any thing of the matter, does in my apprehension a good deal shake the credit of the witness. It is highly improbable but that she must know the fact very well.

Mrs. Cartwright then goes on, and says in answer to the 16th interrogatory, " That she also learned from the said Charity Gould or Elizabeth Gore or one of them that the said deceased had given such will to Mrs. Cottrell, but when she knows not; and she thinks according to the best of her recollection that she was also informed by

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" the said Charity Gould or Elizabeth Gore or
 " one of them that the said Mrs. Cottrell had said
 " something about the said will not being witnessed,
 " but what in particular she cannot set forth, and
 " that she the said Mrs. Cottrell made also some
 " allusion to the said deceased of the decree in
 " Chancery which had gone against her children."

Now this is what I was looking for, and that is a confirmation of that very material part of the evidence respecting the conversation of the 24th; for it is certain that Mrs. Elizabeth Cartwright soon after her coming to London was informed either by Gould or Gore of all the circumstances; she was informed that the will was delivered by the deceased to Mrs. Cottrell; she was informed there was a conversation, and that such conversation did pass between Mrs. Cottrell and the deceased as she has represented to have introduced the subject of the will; and this being confirmed in the very material manner I have now observed upon, I think I have no room at all to doubt of the truth of the matter. It is such a proof that, on the 24th the deceased did enjoy a perfect knowledge of what was done, and what was necessary in order to establish it, that there could not be well a stronger proof of a lucid interval.

Another circumstance in this cause is the will which the deceased made early in her disorder, and I think there can be no question of her having a lucid interval at the time she sent to Mr. Welby an attorney and a man of credit to make the same; she told the attorney she wanted to make her will; she gave him instructions by word of mouth; there

was a discourse between them at the time of the attestation; it was perfectly executed, and he says he had not the least idea there could be any question at all as to her capacity to make a will at that time. The contents of that will had nothing irrational in them, because the attorney expressly says there was nothing of insanity appeared, he says he made the will and actually took his instructions while she was in bed, and that he took it home with him, and that a few days afterwards he received a letter desiring the will which she afterwards burnt; that was an insane act, but in my opinion when she made it she had a capacity to do, and actually did a sane act; for she gave instructions for the will which do not at all impeach her sanity, though she wrote a few days after a letter, which is a rational letter upon the face of it, desiring him to bring the will back; the account which is given by Jane Jones respecting the burning of the will is what conveys the opinion of the witness that she was at that time insane, for she says, "that a few days after the deceased came to London from Sherborne castle the deceased called the deponent into a room and put a paper into her hand which she desired her to burn; that the deponent went towards the fire to burn it, and the deceased took hold of her by the shoulders and held her whilst it was burning, and in a furious manner kept calling out to the deponent, There you devil, do you see it burn, you will go to the parish now you devil," or some frantic expressions of that nature, during which time Charity Gould the said deceased's at-

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tendant was present; that she did not assign any reason for causing the deponent to burn the said paper. And this deponent further saith that she believes the paper which she so burned was a will, which she understood had been made for the said deceased.

The account given by Charity Thom is I think not quite so strong and more equivocal; it is that the deceased said she should be happier.

The conversation that passed between the deceased and Mrs. Cottrell respecting this business is this, she says, "Upon the 5th of December, 1774, (which was just after she came to town,) the deceased told the respondent in general terms that she had made her will the day after she left Sherbourne Castle in favour of the respondent's children, and afterwards, more circumstantially on the 24th of the same month, when she told the respondent the medicines that Mr. Graham the apothecary had given her had disordered her head, for that on the Saturday she had come from Sherborne Castle she was very well in her head, and that on the Sunday; the following day, she was very sensible as Mr. Welby the lawyer could witness as he came to her on that day by her appointment, and he knew she made her will and that she made it as she ought, as he knew she should then do; but that when she took those medicines, she sent for her will, and that she did not know why, but in a sudden flight she had jumped out of bed and had thrown the same into the fire, that she was very miserable she had done so, as she knew

“ that it was very wrong and that she had now
 “ lost her senses and could not make any other
 “ will, or she expressed herself to that or the like
 “ effect, and the respondent is more particular as
 “ to such last mentioned conversation as she made
 “ memorandums of the same at the time.” Now
 this has been represented as an absurd piece of
 evidence to shew that the deceased was at that
 time rational and sensible, because she declared
 herself that she was not so, and was therefore in-
 capable of making another will. That the de-
 ceased was then very much disordered is unques-
 tionably true ; but she was not perfectly irrational,
 she knew what she had done, she remembered all
 the circumstances and it must be supposed the
 contents of the first will, and that they were some-
 thing which she was desirous of carrying into ex-
 ecution. Mrs. Cottrell speaks positively to two
 dates of conversations ; she mentions the beginning
 of December and the 24th, and besides that se-
 veral other times the deceased did express her
 misery, and was sorry she had destroyed the will.

The fact that she was capable of doing an act
 that required thought and judgment is I think fur-
 ther established by the receipts which are exhi-
 bited, and of which a good deal has been said in this
 cause ; they bear date, one of them 26th Decem-
 ber, 1774, one 27th October, 1775, one 15th De-
 cember 1775, one 6th April, 1775, one 3d October,
 1776, and one 24th December, 1776 ; all but one
 after the date of the will, and all of them are of
 the deceased's handwriting ; there are two dated
 in March, 1775, which are not. It was said by

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Dr. Nicholl that those which were not in the deceased's handwriting were not accounted for, and he rather seemed to throw out some suspicion that those which are in the deceased's handwriting might possibly have been obtained by Mrs. Cottrell with a view to give countenance to the will itself; but it is very fairly accounted for in evidence, for when Dr. Battie attended the deceased at the beginning of January he refused her the use of pen ink and paper, therefore the two receipts that were written in March are in the handwriting of Mrs. Cartwright, not with any view of contrivance, but in order to assist the testatrix who was then kept from the use of pen ink and paper by medical direction; the first thing the testatrix did when she was permitted to have pen ink and paper was to write the will of the 14th August, 1775, and from that time she wrote receipts in as regular a manner as any person living could have done, and with a great deal of recollection; she mentions who was the receiver, the date, and the estate upon which it was secured. What is recollection and knowledge of a fact if this be not?

There are three receipts exhibited, and those are said to have been thrown by about the room, and of which she knew nothing; they are produced and brought before the Court to shew that she was not capable of writing receipts rationally; those receipts are all written upon the same day, namely 26th April, 1776, and in my opinion they shew capacity. It appears to me they were attempts, begun and not finished, in order to write the receipt of that date, which she completed and

which is before the Court. It appears then most clearly her manner of writing those receipts was the manner in which she wrote the will; she was extremely accurate in doing it, and when she had made some trivial mistake she abandoned the one she had begun and began another. The mistake in the receipt which is the nearest completed was in the last figure, she intended to write 1775 and had wrote the three first figures and began to write 6, therefore she gave up the whole and wrote a fresh one; the utmost that can be said is, that what she did was with the greatest accuracy, and perhaps more than any other person would have used, but there is nothing like an irrational word in the whole, nothing foolish or wild. Was she dictated to? certainly not by Mrs. Cartwright, because she says she never saw her write any thing but her name; therefore that they were dictated by her would be mere suggestion, and Charity Thom says she used to be writing or attempting to write by herself, and used to say she could not write and gave over; mention is made by the witnesses of the great deal of difficulty and great persuasion they were obliged to use; and Mrs. Cartwright has said the method that was used to get her to write was PERSUASION. Is that discourse which is addressed to an insane person? It is that which may be addressed to an indolent or obstinate person, but surely not to one insane; nor is it the conduct of an insane person to do what they are desired to do; there are acts I think which plainly shew the deceased had lucid intervals, that is, there were intermissions of the disorder upon

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which she was able to act rationally ; besides this, it appears clearly she used to discourse like a rational person. There is one instance in particular, spoken to both by Mrs. Cottrell and Mrs. Cartwright ; but I will mention the manner in which it is deposed to by Mrs. Cartwright, she says, about nine or ten years ago her son was offering himself as a candidate for All Souls' college Oxford, and she asked the deceased in what manner they were related to my Lord Fairfax ; she says the deceased entered upon the conversation in the most rational manner, she answered her questions, and in all respects discoursed like a sensible person ; she explained the descent of the family, and the respondent did think she was capable of giving a sufficiently accurate account. Is not this what requires a very accurate memory and recollection ?

The other witnesses speak of the same things, but the turn they would give it is that this was a part of the insanity, but you are to observe not one of the witnesses say she ever mentioned any thing that was not true. Mr. Morris states that the deceased was extremely correct in her ideas about families and their intermarriages, and the respondent hath received information from her when talking on such subjects of circumstances which he did not know at the time and which he has afterwards found to be very correct and true, and he was surprised at the said deceased's precision on those points. Why ? if she could converse for a considerable time ; he says he used to be with her sometimes for half an hour or more. There is

another witness (Pooley) at whose house the deceased was placed, and she gives a very strong instance of her memory, which continued with her till almost the last hour of her life; the deceased had not seen the deponent from the time she lived in her house, and then she had a little boy with her; the deponent was standing at the door talking with Charity Thom, and the deceased put her head out of the window and said, "What is become of the little boy." So in a variety of instances the deceased would and did converse rationally. They say the great height of her phrensy used to be to her servants, but when any of her relations approached she would be calm; and Mrs. Cartwright says, "She has heard her extremely loud, and when she came in she would be extremely calm." Is that the conduct of a person who has no distinction of persons? What does it prove? That there is almost no person so mad as not to have some degree of reason. If she had some degree of awe for any persons, perhaps they were those she had an entertainment from and could converse with like a rational person; if she could converse rationally that is a lucid interval; and that she so did and had lucid intervals I think is completely established. If she had particular subjects or topics in her mind, and at such times would talk rationally upon them, and when those topics were out of her mind would fly into outrages of phrensy and extravagance, does that all shew that at the former time she was deprived of rational capacity? in my opinion, not; at one time she had capacity enabling her to make

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a will, at others not ; at one time she was in fits of phrensy, and at another out of them.

How then stands this case as to those cases which have been cited, and as to the facts necessary to establish a lucid interval.

In the *Attorney General v. Parnter (a)*. The circumstances of the case are not very accurately mentioned in the report. It differs, however, as materially from this as any two cases can do. The act was the execution of a power of attorney. The subscribing witnesses said the party appeared to them to enjoy her faculties sufficient for the purpose, and they explained the nature and effect of it to her, and asked her if she did it with her free will and consent, to which she readily answered, " Yes ;" and then executed it. And this is all the evidence as to her sanity. They bring an instrument ready written, tell her what it is, ask her if it meets her consent, she says, " Yes," and does it freely. Is that the present case? No. If this will had been prepared by Mrs. Cottrell, and brought to the deceased, and read to her, and she had been asked if that was her mind, and had executed it, that would have been a different case from the present. In this case the act is done and completed by the deceased herself ; it is not a mere acquiescence, or form of execution only ; there is not the least colour of proof that it had been suggested to the deceased by any person living.

The ground for a new trial in Parnter's case

(a) On a motion for a new trial. Hilary Term, 1792. See *Brown's Chancery Cases*, Vol. III. p. 441.

was, that the jury, having been directed to enquire into the fact, they gave a general verdict that she was not a lunatic at all, directly against the evidence. And what the Lord Chancellor said is just. The persons there who witnessed the act, apprehended it was proper in itself, and scarcely watched the means with sufficient attention. Undoubtedly the rules laid down there were with a view to the facts of the case; but I do not see how a stricter proof can be given than has been in the present case.

Clarke v. Lear and Scarwell (a) was the case of a man who had been clearly disordered in his mind for a length of time; he goes to Little Hampton to bathe in the sea, and there he sees a young woman at the house where he boarded, of whom he had no prior knowledge, and wants to marry her, at a time when he was insane, is brought up to town in a strait waistcoat, and there afterwards writes a paper by way of codicil, giving her a legacy. This is delusion. It is said that paper is as well written as this will; but who was it made in favour of? it was for a person whom he hardly knew, and of whom he had conceived a favourable impression at a time when he was clearly in a state of derangement, but to whom he had no cause whatever to give a benefit. In cases of this sort you are to enquire was it a rational and sensible act, and if you can make it appear that it is a rational and sensible act, then you go the whole length the law requires.

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In *Coghlan v. Coghlan*. No man could be more completely proved to be insane than the deceased in this case before the will was thought of ; I remember it most perfectly, he was sent to Brook House, and there he was attended by Dr. Monro, an apothecary, and a woman, and they all of them say he was a person as insane as they had ever seen ; he was likewise visited by a gentleman, Mr. Winthrop, who was known to him, and with whom he entered into a rational conversation respecting his family, and exactly as he had told Mr. Winthrop he gave directions to an attorney to make his will, which was to the benefit of his family, except his grand-daughter ; but she had had a fortune left her, and he had frequently declared he would leave her but £100 as she was fully provided for ; the will in that case was drawn, and when it was first brought to him he was in some degree recovered ; it was then read over to him, and he declined executing it at such time, but he did execute it afterwards, and it appeared to be the intent and desire of the testator, who had an interval to express himself ; the attorney said he gave him instructions in a very composed manner ; and upon that ground the will was pronounced for ; there was no disorder at the time, though he was afflicted with a distemper of the mind to a very great degree, and the will was consistent with his intentions when of capacity.

In *Greenwood v. Greenwood*, the last verdict established the will, and I do not see any one of the cases which militates against the present.

I am of opinion in this case that the deceased by herself writing the will now before the Court hath most plainly shewn she had a full and complete capacity to understand what was the state of her affairs and her relations, and to give what was proper in the way she has done. She not only formed the plan, but pursued and carried it into execution with propriety and without assistance. In my apprehension that would have been alone sufficient, but it is further affirmed by the recognition and the delivery of the will. Therefore under all these circumstances I have no doubt in pronouncing this to be the legal will of the deceased.

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Delegates,
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HIGH COURT OF DELEGATES.

CARTWRIGHT AND CARTWRIGHT v. DAME BYZANTIA CLERKE AND CARTWRIGHT.

From the sentence of the Prerogative Court an appeal was interposed to the High Court of Delegates.

Michaelmas
Term.
November 13,
16, 20, 25, 30,
December 1, 8,
9, & 11.

The cause came on for hearing before

Mr. Baron PERRYN,
Mr. Justice GROSE,
Mr. Justice ROOK,
Doctors HARRIS,
FISHER,
and
ARNOLD.

The King's advocate (Sir William Scott), the Attorney General (Sir John Scott), and Mr. Mansfield argued in support of the will.

Dr. Nicholl, Dr. Lawrence, and Mr. Grant, contra.

The King's advocate and the Attorney General were heard in reply.

The Court took time to deliberate.

December 22. The sentence of the Prerogative Court was affirmed ; but the Delegates gave no costs.

EARL OF WARWICK v. GREVILLE.

1809.
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July 11.

JUDGMENT.

Sir JOHN NICHOLL.

Primogeniture
gives no right
to an adminis-
tration.

The question in the present case arises upon the grant of an administration to the goods of the Right Hon. Charles Greville who has died intestate.

The deceased left two brothers, one sister, and a nephew the son of a deceased sister; the property must be distributed amongst the four; and there are three persons to whom administration may be granted:

The earl of Warwick, the elder brother, prays that it may be granted solely to himself, or to himself jointly with his brother Mr. Robert Greville: The younger brother Mr. Robert Greville prays that it may be granted solely to himself, and he is supported in this prayer by the nephew Mr. Churchill, who is entitled to an equal distributive share of the property: the sister Lady Frances Harpur prays first that it may be solely to her brother Robert, then solely to Lord Warwick, or jointly to him and her brother Robert, and lastly solely to herself, or jointly to herself and the elder or both brothers.

The statement is rather complicated, but the result of it is that there is a moiety of the interests concerned praying the sole administration for Mr. Robert Greville; a quarter of the interests pray-

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ing the sole administration to Lord Warwick ; a quarter praying the sole administration to Lady Frances Harpur ; a quarter the joint administration to the two brothers ; a quarter a joint administration to the elder brother and the sister, or to both the brothers and the sister, for Lord Warwick unites in praying that it may not be jointly to himself and his sister.

The (a) statute leaves it to the ordinary to grant

(a) The jurisdiction which the Ecclesiastical Court exercises over the effects of persons dying without a will rests on a very ancient foundation : in the early periods of our history the ordinary had by common law the absolute disposal of the personal property of all intestates ; and, under the pretext of applying their goods to religious purposes (in pios usus), possessed itself of them not only in cases where the deceased left a widow and children or other near relations, but in defiance also of the just claims of creditors. On this footing the law continued under the Norman kings and the first sovereigns of the line of Plantagenet ; but when the free spirit of our constitution, which had been long labouring under the pressure of the feudal institutions and the shackles of Papal superstition, commenced those struggles which ultimately led to its emancipation, the abuses practised by the ordinary in the administration of the effects of intestates became in their turn subjected to correction and control.

The 32nd article of the *Magna Charta* extorted from King John expressly provides against them ; but it is a curious fact, and one which strongly marks the influence of the Papal power in England at that period, that this article was wholly omitted in the *Magna Charta* of Henry III.

13 Edward I. st. 1. c. 19. (commonly called the Statute of Westminster,) made the estates of intestates liable to the payment of their just debts.

31 Edward III. st. 1. c. 11. compelled the ordinary to depute the next and most lawful friends of the deceased to administer his goods.

letters of administration to the next of kin ; all here have an equal interest ; all except the nephew stand in an equal degree of relationship ; none have a legal preference ; the selection rests with the discretion of the Court ; that discretion however is not to be arbitrarily or capriciously assumed, but to be a legal discretion governed by principle and sanctioned by practice ; in exercising it the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court then is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution ; the primary object is the interest of the property.

The claim of Lord Warwick to the sole administration rests merely on the circumstance of his being the elder brother ; none of the other parties interested support that application ; Lady Frances did execute a proxy praying that it might be either solely to herself or jointly or solely to her brother, but she has since retracted that, and her last proxy is that it may be solely to herself or jointly with him or to both her brothers.

Primogeniture gives no right ; if things are precisely equal ; if the scale is exactly poised, being the elder brother would incline the balance, but it would not weigh against the wish of the majority of interests. In the present case there are two

21 Henry VIII. c. 5. placed the law on the footing on which it now stands.

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interests out of the four praying that the sole administration may be granted to the younger brother, and against that majority the claim of primogeniture could not stand, this would give a decided preference if nothing else did to the younger brother.

But it has been said there is not a majority of interests this way inasmuch as there is an equal number of interests praying for a joint administration; this is not correctly the fact; no two parties have joined in praying for a joint administration, Lord Warwick does not pray to be joined with his sister; the other brother does not pray to be joined with Lord Warwick or the sister; it is Lady Frances only who prays to be joined either with Lord Warwick or with both the brothers.

Assuming however that Lord Warwick and his sister did unite in praying for a joint administration, the interests indeed would be even, but it would be an application for a joint opposed to an application for a sole administration. It has been correctly stated that the Court never forces a joint administration, because if the administrators were at variance it almost put an end to the administration. Further, the Court prefers *ceteris paribus* a sole to a joint administration, because it is infinitely better for the estate; administrators must join and be joined in every act, which would not only be inconvenient to themselves, but what is of more consequence must be inconvenient to those who have demands on the estate either as creditor, or as entitled in distribution.

Supposing then there was in the present case an

equality of interests, and that the Court had to choose between a sole and joint administration, still the sole all other circumstances being equal would be entitled to the preference ; here are also considerable creditors who support the application for the administration being granted to Mr. Robert Greville. I collect that there is some doubt whether the estate may be solvent or not much more than solvent ; it may be of considerable importance that the affairs should be managed in the most speedy and advantageous manner ; the wishes of the creditors are not in all cases of weight, but they are entitled to consideration where the estate is considerable, the demands heavy, and the solvency in the slightest degree doubtful.

These considerations are sufficient where a moiety of the interests supported by considerable creditors join in praying the sole administration to be granted to one of the brothers to whose fitness not the slightest objection has been raised ; there are other considerations which it is not necessary to enter upon except so far as to state that they tend to the same conclusion ; there are reasons however for not unnecessarily discussing them. I wish however distinctly to state that the Court in feeling itself called upon in the discharge of its judicial duty to grant the administration to Mr. Robert Greville is not governed by any circumstances which reflect in the slightest degree on the honor and character of the noble earl who is the other party to this suit.

Administration decreed to Mr. Robert Greville.

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SANDFORD v. VAUGHAN.(a)

Three papers
established, as
containing to-
gether a will.

THIS cause came on for hearing on the evidence adduced in support of the allegation, which had propounded papers 1, 2, 3, and 4, as containing together the will of the deceased.

Ten witnesses were examined; but the only portion of their evidence to which it is material to advert, is, that of *Mr. Scott*,

Who, after stating that the deceased had consulted him in April, 1808, as to the form of his will, and had requested him to write the preamble for him and the names of the legatees, leaving blanks for the sum he intended to bequeath to each, proceeded thus:—"That, on the 28th of May, the deceased produced the paper writing so, as aforesaid, written by the deponent on the 14th of April, with the blanks for the legacies all supplied, and the paper itself dated and signed; and he directed him to make some alterations therein, [here the witness specified the alterations,] and, having so done, he read it over to the deceased, being the paper No. 1. That Sir John Chichester immediately desired the deponent to transcribe it, on account of the alterations and interlineations, which he accordingly did,—the deceased dictating to the deponent, and transposing some of the bequests.

(a) See pages 39 and 48.

That the legacies of two years' wages given to the servants in No. 1 were omitted in the deceased's dictation of No. 2. That finding No. 2 was to be of a more formal and secure nature than No. 1, he suggested to the deceased the propriety of appointing an executor ; which he approving, named the Rev. John Sandford and the deponent. That the deponent observed that one was sufficient, and begged to decline ; and that the deceased then desired him to write down Mr. John Sandford alone : he then read the paper over to the deceased, and suggested the propriety of having the same witnessed to render it more secure, and offered to witness it himself ; but the deceased said, that, as he intended to give the deponent something, he could not be a witness ; to which the deponent replied, that he might give him something by a subsequent paper, and then he should be a good witness. The deceased said it should be so, and then signed and sealed No. 2 ; and the deponent signed his name as a witness. That after such execution, the deponent discovered that in transposing the legatees' names, the legacies of two years' wages to the servants were omitted, and mentioned it to the deceased, who observed that it was of no consequence, as they could be inserted in the will to be made, alluding to the one to be prepared by Mr. Harman."

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JUDGMENT.

SIR JOHN NICHOLL.

The case has already received much discussion on two preliminary points, and is now reduced to a very narrow compass ; it is unnecessary to repeat

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what took place in the earlier stages of the cause, further than to observe that subsequent investigation has confirmed the Court in the propriety of the conclusions it drew from the face of the papers.

Witnesses have been examined to prove, that the papers were executed by the deceased, with an intention of giving them a testamentary effect, and that he was a competent agent.

The proof is perfectly satisfactory; and there can be no doubt that *Nos. 2, 3, and 4*, must be pronounced for. The only question is, Whether *No. 1* is to be considered as a part of the will, or to have been superseded by a subsequent paper; or, in other words, whether *No. 2* was intended to be taken in addition to *No. 1*, or as a substitute for it?

The account given in evidence by Mr. Scott, the apothecary and confidential friend of the deceased, most fully confirms that which appeared from the papers themselves—that *No. 1* is the mere draft of *No. 2*; that *2* was substituted for *1*, and superseded it; and that the deceased had not the slightest intention of giving effect to both instruments.

It is said the servants will lose their legacies through a mistake, and so they will; but the Court cannot help this.

It is further said that I might pronounce for the clause as omitted by mistake; and the Court would go a great length to do so, as it has done in other cases, if it were owing to the mistake of a third party. But here the mistake was that of the de-

ceased himself. He dictated ; if an omission, it was his own. The paper was read over to him, he formally executed it, and it is attested. It would be a most dangerous step, and one not sanctioned by any precedent, upon parole evidence alone, to supply a clause which has been omitted ; but the deceased himself was aware of it ; it was pointed out to him, and he himself proposed the remedy ; to insert them in a formal will. This would render it still more dangerous ; he wrote subsequent papers, and executed others prepared by Mr. Harman ; these omitted legacies were not supplied.

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~
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Under such circumstances the law must presume that they were intentionally omitted ; it can only safely look to facts and to written papers, not to parole declarations.

The principle must be applied however the Court may think that the omission in this case was accidental in the first instance and forgetfulness in the second ; there may be strong claims upon the liberality of the next of kin to pay these legacies to the servants, more especially as the residue may possibly be undisposed of, and come to them more from the inactivity and indecision of the deceased than from his real intention ; but with this the Court cannot interfere judicially, not even in the way of recommendation.

Upon the whole I think *No. 1* not entitled to probate, but pronounce for 2, 3, and 4, together, as containing the will of Sir John Chichester.

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July 11.

WILSON v. BROCKLEY.

An allegation
pleading the
nullity of a
marriage ad-
mitted to
proof.

AMELIA Brockley, otherwise Girard, died having made a will in which she appointed Edward Wilson sole executor.

A caveat was entered against this will by Robert Brockley who alleged that he was the lawful husband of the deceased, and he further propounded his interest in an (*a*) allegation in which he pleaded his marriage with Amelia Brockley then Amelia Langley by banns in September 1780, his cohabitation with her, and separation from her, and the fact of her having been illegally married in the year 1795, to William Girard, by her maiden name of Langley.

In reply to this, Edward Wilson the executor under the will now tendered a responsive allegation, pleading,

First, that part of the marriage act which requires the publication of banns, and regular notice to the minister of the true Christian and Surnames.

Secondly, that Amelia Girard widow, falsely called Brockley, was the illegitimate daughter of Martha Burt and John Langley; that Martha Burt swore the child to Langley, and that Langley compounded with the parish for her maintenance,

(*a*) Prerog. Hilary Term, 1810.

that Mary Burt shortly afterwards married a person of the name of Bannister, and that in consequence of this marriage her illegitimate daughter assumed the name of Bannister, and from that period constantly passed and was only known by the name of Bannister.

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Thirdly, that the banns pleaded to have been published between Robert Brockley and Amelia Langley, who was only known by the name of Amelia Bannister, were on that (a) account unduly published, and consequently the marriage was absolutely null and void.

The question before the Court was, as to the admissibility of this allegation.

Swabey for the husband.

The allegation does not plead that she was not baptized as Amelia Langley, and the register of her baptism is not offered to the Court; an illegitimate child has no name unless by baptism; by baptism she acquires a name which can only be changed at confirmation.

Besides the allegation is inadmissible on principle, as the proceedings are not instituted *inter vivos*, but after the death of one of the parties.

Barnaby contra, for the executor.

The Court has clearly jurisdiction; it has exercised it in *Haydon v. Gould*, *Copps v. Follon*, and a variety of instances.

It is not necessary to plead the entry of the baptism, because an illegitimate child if she has acquired no name by reputation can only be entitled

(a) 26 Geo. 2. c. 33. s. 1. 26 Geo. 2. c. 33. s. 2.

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to the name of her mother. It was held so in
(a) *Wakefield v. Mackay*; in that case an illegiti-

WAKEFIELD v. MACKAY, otherwise LASCELLES, otherwise
THORPE, otherwise JACKSON, falsely calling herself WAKE-
FIELD.

1807.
Consistory
Court of
London.
Michaelmas
Term.
Nov. 17.

JUDGMENT.

SIR WILLIAM SCOTT.*

This is a suit for a nullity of marriage instituted by Daniel
Wakefield, Esq. against Isabella, described in the libel as Isa-
bella Mackay, falsely calling herself Wakefield.

The parties were married in the church of St. James's, Clerk-
enwell, on the 29th of May, 1805, after a proclamation of
banns under the names of Daniel Wakefield and Isabella Jack-
son. It was observed in argument that this was not a new con-
nexion; and it certainly was not, either with relation to the time
of their acquaintance which preceded this marriage connexion, or
to the nature and description of that connexion.

Mr. Baster, who appears to be a fellow student of Mr.
Wakefield's at one of the inns of Court, has been examined;
and he deposes upon the fifth interrogatory, that he had under-
stood from Daniel Wakefield the producent that he first became
acquainted with the ministrant six or seven years ago; this
brings it to about the year 1800; it appears that she and Mr.
Wakefield cohabited together during the former and latter part
of that period; for it appears that she during the former part
of that time passed by the name of Lascelles at the lodgings
where he the producent there kept her as his mistress; who is
the seducer and who is the seduced in this case does not at all
appear; what the age of Mr. Wakefield is is not disclosed upon
the evidence, but this woman appears to have been of extreme
youth at this time, I think by the dates assigned not more than
fifteen years of age, which lays some ground for probability
that she was not the first who took the active lead in forming
this connexion,

* This judgment is copied from a note taken in short hand
by Mr. Gurney.

mate child was baptized in the name of her mother, and though in the course of her life she

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What name she bore at the time Mr. Wakefield was introduced to her, or under what circumstances she was living, does not at all appear; very soon afterwards, namely in February, 1802, she took the name of Lascelles, Mr. Wakefield at the same time assuming the same name and passing as Mr. Lascelles the husband of Mrs. Lascelles; he introduced her as his wife to a boarding school, where he visited her he passing under that name. In 1803 she went to Salisbury under the name of Thorpe; the manner in which she assumed the name of Thorpe is described in her answers to be this, "That upon her going into the country Mr. Wakefield tendered to her a list of names for her acceptance, recommending the name of Baddeley; that she disapproved of that name and chose in preference the name of Thorpe;" she went to various country places, and as some part of the evidence would rather seem to disclose as an actress in a country theatre; she returned to London in 1804; they then cohabited together, he under the name of Mr. she under that of Mrs. Thorpe, he taking a house and keeping a house, paying bills, and carrying on other transactions in that name.

In September 1804, a Roman Catholic marriage took place between them, and she assumed the name of Wakefield with his perfect knowledge and consent; after this ceremony solemnly though not validly performed she attracted the attentions of this witness Mr. Baster; he admits upon an interrogatory that after the said marriage according to the rites of the Roman Catholic church, he himself made professions of love and affection to the ministrant, and endeavoured to prevail upon her to leave Mr. Wakefield and marry him the respondent; and in or about the month of April, 1805, he caused the banns to be published in the parish church of Iver for the marriage of himself with the said Isabella Wakefield the ministrant by the name of Isabella Jackson.

That this offer on the part of Mr. Baster was produced by any effort on her part is I think repelled by the account which Mr. Baster gives that he was the person that endeavoured to prevail upon her; he describes her as a woman of an engag-

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BACCHLEY.

had used a variety of names still the Court held that the banns having been published in the name

ing person and interesting manners; the only unfair practice imputed to her is, that she fraudulently concealed her birth and parentage and pretended a connexion with divers noble and illustrious families; to that part Mr. Baster is the only witness, and he proves that she did state herself to be the daughter of the Honorable Mrs. Sandford, connected with the Marquis of Thomond and other considerable persons.

That this was done for the purpose of effecting any marriage, or the particular marriage upon which I have now to decide, does not appear; it might be the gratification of an idle vanity, the purchase of a little present importance amongst the persons with whom she was living, and not at all with any view to the effectuating any marriage; for upon the whole of the evidence I see no anxiety on her part to procure the marriage, she had been content to live upon lower terms with Mr. Wakefield; Mr. Baster's admission upon the eighth interrogatory proves I think that her ambition was not very active in procuring this marriage, for he answers that he believes Mr. Wakefield frequently entreated and endeavoured to prevail upon the ministrant to consent to be married to him, and that it was in consequence of such intreaties they were afterwards married to each other, and when she is married she does not use the name of Mrs. Sandford whose daughter she had represented herself to be but the name of Jackson.

I see therefore no reason to think that this fraud was practised with the intention imputed in the libel, namely, that she falsely pretended that her real name was Jackson, and that she was related to divers noble and illustrious families, and to a person who had married an opulent West India planter of the name of Wells, stated to be her aunt, and that she having completely gained the affections prevailed upon the said Daniel Wakefield to consent to be married to her, and she accordingly was so married; the representation being that on the contrary it was he who endeavoured to prevail upon her, and that she consented to this marriage in consequence of his solicitation.

I see no reason to think that this fraud had that effect upon Mr. Wakefield, because from his answers I collect it to have

of her mother they had been published in her proper name.

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been his general persuasion that she was the daughter of this person the same as she is described to have been in this libel; but taking the fact to be otherwise that a fraud had been practised with this view and that it had been successful, that Mr. Wakefield had been captivated by this pedigree which she had assumed to herself, still that will not in the least of itself affect the validity of this marriage. Error about the family or fortune of the individual, though produced by disingenuous representations, does not at all affect the validity of the marriage. A man who means to act upon such representations should verify them by his own enquiries; the law presumes that he uses due caution in a manner in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity however it may have been produced. I must I think lay all that, both in point of fact and in point of law, out of the question; and I must consider this case as confined to the legal question arising upon the fact of her being married under the name of Jackson by proclamation of banns when she had borne the several names I have before recited. To prove a nullity of marriage it must be shown to the satisfaction of the Court that Jackson is an untrue name.

The libel pleaded that she was the natural and lawful daughter of John and Ann Mackay with whom she is proved to have lived much, and whom she is proved to have treated with great filial affection, as she did likewise a brother and a sister with much sisterly affection; the fact established however by the evidence of her mother and of two other persons who are examined is I think clearly what I am bound to take as the real fact of the case upon this evidence, that she was the daughter of Ann Mackay whilst a spinster under the original name of Jackson; there is no evidence who was the father of this child, but at any rate she is not to be considered as the natural and lawful daughter of John and Ann Mackay.

It was said by the counsel that the party having set up a legitimacy had no right to avail himself of what turned out to be the fact, the contrary evidence of illegitimacy. I am of opi-

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JUDGMENT.

SIR JOHN NICHOLL.

The suit is instituted to prove the will of Ame-

nion that Mr. Wakefield has a right to use any evidence introduced into the cause by either party if he can arrive at the conclusion that Jackson was not the true name by any other means, and that he has a right to avail himself of the benefit of that conclusion however obtained.

It occurs to me that there are three possible ways in which this case may be put on the one side and on the other.

First, that any one of these names was a sufficiently true name so long as she continued to go by it.

Secondly, that none of these names can be considered as a true name, for that the circumstances of her birth and fortune were such that she never acquired what the law can consider as a true name; and,

Thirdly, that only one of these several names can be deemed the true name of the party, and that the Court is bound to ascertain that name in order to determine upon the validity of this marriage.

That any of these names is a sufficient name for the purpose was submitted upon an authority entitled to great respect namely that of Sir Joseph Jekyll Master of the Rolls, who in the case of *Barlow v. Bateman* * lays down certainly in very unequivocal terms that any one may take upon him what surname and as many surnames as he pleases; and for the time during which he uses such a surname, if he has a right to use it, it is what cannot be denominated an untrue name.

I am far from meaning to trench upon the authority due to that great man when I say that the solid grounds on which this proposition of law is stated do not appear to have occurred to him just at the moment of the delivery of that judgment; because the reason stated in that report can hardly I think be deemed satisfactory to produce such a conclusion; it is stated that the reasons are, first, that surnames are not of very great

* 3d Peere Williams, 65, 6.

lia Girard. The will is propounded by the executor, and opposed by Robert Brockley, who alleges

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antiquity; it is now pretty well established that surnames were fully in use even among the common people by the reign of Edward II., which is now five hundred years ago, a pretty reasonable period for the establishment of any legal usage. It is observed that in ancient times the appellation was by the Christian name and place of habitation, as Thomas of Dale, which Thomas of Dale is of itself a surname, a local surname, but not less a surname on that account, for surnames were local, taken frequently from places of habitation, or from other circumstances that belonged to the individuals to distinguish men who were not at all distinguished by Christian names. The Christian names are scattered about among the mass of the people with such profusion that the Christian name is no distinction at all, and the very introduction of the surname was to discriminate that which was not before discriminated.

It is observed that the usage of an act of Parliament for a name is but modern; certainly it is, and so are acts for any other private family concerns, they are of modern introduction, but there has been a practice of great antiquity, that is the grant of a surname by the crown, passing through one of its public offices; certainly the ancient style of the ancient offices of the crown are some authority upon the subject; however I would observe likewise upon the confusion that must be produced to a degree that would compel a legislative correction if the practice at all followed this rule that every one might take what surnames he pleased, the whole world would be at hide and seek about identity in the concerns of almost every individual. I am however perfectly content, as I ought to be, to take this assertion coming from so venerable a person, confirmed as it is by other documents of the like kind; but, taking it as generally true, I think that the particular case of the marriage act might be admitted to form an exception. The marriage, except in case of a licence, is to be performed by proclamation of banns, which is to designate the individual in order to awaken the vigilance of parents and guardians, and to give them an opportunity of protesting their rights; it therefore requires

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that he is lawful husband of the deceased; his interest is denied and propounded; an allegation

that the true name should be given them, evidently considering that a name assumed for the occasion is a name that will not answer the purposes of these provisions; accordingly this Court has conceived itself to be carrying the intention of the law into effect, when it has annulled marriages where a false name has been inserted in the banns though no fraud were intended, upon the ground that such proclamation was no proclamation referring to that marriage but to another transaction, the marriage therefore was without proclamation of banns and consequently illegal; there was a fraud, a want of fidelity and truth in the application of the banns to the marriage, though there might be no fraud in the original intention; it is therefore I think clear that if there is a true name that true name must be used: it may be a name less notorious to the world than some name which the party has thought fit to assume, but it is not less the true name on that account, it is the name which it is presumed her relations her parents and her guardians are the best acquainted with, and therefore the name which ought to be applied on such an occasion, provided she is possessed of such a name.

But it may be said in the second place, that under the circumstances of this person's birth and fortune she never did become possessed of that which the law would consider as a true name. It is I think a possible case that there may be no true name ascertainable as belonging to an individual; suppose the illegitimate child of a person who had been tossed about the world in a variety of obscure fortunes and situations, who has at different times been passing under different names; the child of such a person at a marriageable age may not be possessed of any name so clearly established by usage as to be depended upon for so serious a purpose as that of invalidating the marriage.

What would be the rule of law in such a case? in my opinion, it would be that such a person would be out of the statute. The law presumes, as is generally true, that every person has a name; but the law which presumes that, and calls for that

has been given in pleading his marriage with the deceased, in 1780, by banns, under the name of

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Beckett.

name, does not compel parties to impossibilities ; and, if the party is not possessed of that which can be considered as a true name, in my apprehension it would not be unfair to say that the marriage of such a person would stand upon the old footing of the canon law, which required banns as matter of regularity, but not as matter of necessity to the validity of a marriage. Perhaps those who have attended to the evidence, and to the long and elaborate arguments which have been constructed upon it, may be disposed to entertain an opinion that this very case approaches something towards that description ; an illegitimate child, very little history applying to the early periods of her life, assuming a succession of five different names before she marries ; certainly it must be admitted that it is no easy matter to ascertain what has a right to be considered as the true name of this individual under all the circumstances.

It may however be said that the legislature has held out that every person has a true name, and that it is the duty of the Court in this case for the determination of the suit to decide which of these several names is that which is best entitled to that character.

Five names have been stated ; three of those have I think been very much dismissed out of the argument, the names of Lascelles, Thorpe, and Wakefield, though she used them for a considerable time ; they were all of them presents from Mr. Wakefield ; the last of them in consequence of the ceremony of the Roman Catholic marriage which had taken place between them. But the question has turned, as I think it ought to turn, upon the competition between the names of Mackay and Jackson which of them is to be considered in the character of the true name of this individual.

I will state the evidence which applies to these names ; six witnesses have been examined, two only of these six witnesses speak of her under the name of Mackay ; of the other four, Pudderphat and Garnett knew her only under the name of Lascelles during the years 1801 and 1802 ; she lodged with Pudderphat during the year 1801 ; and with Garnett during part of

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Amelia Langley. If that marriage was valid the deceased was a married woman, and had no right

the year 1802 by that name. Mr. Baster appears to have known her by the name of Thorpe, till she took the name of Wakefield upon the Roman Catholic marriage. On the 6th of September, 1801, Turner, who was a porter at the inn of Court, carried messages to her from Mr. Wakefield; but under what name or names she then passed or where she was living this witness does not describe. There are only two witnesses who speak to the name of Mackay; the one is a Mrs. Gray, who was an assistant to Mrs. Bayley who kept a Roman Catholic female boarding school at Hammersmith, who proves that she was a boarder for an entire year under the name of Mackay, till January, 1794, being then a child of about eight years of age. The other witness is Mr. Andrews, a perfect stranger to the family, but who was introduced to the knowledge of her by a memorable transaction of her life; he is the surgeon of the police-office in Bow Street; he was brought in to attend a child who had been forcibly violated by a person of the name of Murphy, who was afterwards convicted of the crime; this was in August, 1794, and he identified this person to be the child that he had attended, bearing the name of Mackay. Copies of affidavits which were then made, in which she describes herself as Isabella Mackay, and her mother describes her under the same name, are produced to the Court; and it was observed very justly by the Counsel for Mr. Wakefield that this was a very serious transaction; but the name of the party injured was certainly not the most material part of this serious transaction, for the crime was the having deflowered a child of that tender age; be it Mackay, be it Jackson, it made no sort of difference in the offence of the party, or the punishment he was subjected to in consequence of it. These are the only witnesses who speak to the name of Mackay, one during the whole course of the year 1793, the other in a detached transaction in the summer of 1794. It is a possible thing that this defect of evidence may have arisen from the course of the cause; for having pleaded, as I presume they supposed at the time, that she was a legitimate child, they might have perhaps relied upon

to make this will; whereas, if the marriage was not valid Brockley has no interest to oppose the

the presumption of law necessarily arising from thence that she must be of the name of her father and mother; but, the fact failing, the inference fails, and that fact is as necessary to be proved and directly proved as any other fact in the case.

Now there is no evidence whatever arising from the depositions that are produced before the year 1793, when she was a child of eight years of age, and this transaction which I have just noticed in August, 1794, that applies the name of Mackay to her. There is an entire blank in the history from that time till she emerges as Mrs. Lascelles in the year 1801; it is true that there is upon her answer an admission to this effect, that she did at times during her childhood pass by the name of Mackay.

In the first place I must observe that this admission is that which I have hardly a right to notice, because it is perfectly extra-articulate and gratuitous, there being no allegation in the libel which requires an answer to such a proposition, and therefore the admission finds its way there without any effect. Next I must observe that the admission is pregnant with a contradiction; for, when she admits that in her childhood she passed by the name of Mackay, she insinuates that she passed at other times by some other name, but that name does not appear; it goes no further than this, supposing that an admission which I could notice, that at times she, as was natural, living in their family did pass by the name of Mackay. Such is the whole amount of the evidence that applies to this name.

Now, what is the evidence that applies to the name of Jackson? She is born an illegitimate daughter, the mother gives her the name of Jackson naturally and properly, because, though in point of law she is nullius filia, yet in fact and in nature she is the daughter of the mother who produced her, and therefore properly and usually designated by the name which the mother bore. The mother swears that at her birth she was described as Isabella Jackson, not I presume in the baptismal rite itself where only the Christian name is conferred, but in some register, some record, some formulary or other; that was applied to that

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BROOKLYN.

will, and cannot be admitted as a contradictor to it.

ceremony; the mother swears that at the other sacrament for adult Christians she took it under the name of Isabella Jackson, being the practice of the Roman Catholic church, she received the sacrament as a Roman Catholic, and did other solemn acts in the name of Jackson.

In 1804, she is married by a Roman Catholic marriage to Mr. Wakefield under the name of Jackson without any adequate motive for the fraudulent use of that name, as far as appears, or without any reason for it than her own apprehension that it was the name that properly belonged to her; her mother attending at that ceremony, sanctioning the use of that name, and meaning most certainly not to destroy the validity of that marriage afterwards by the use of an improper name upon the occasion. Her mother swears that it was generally understood afterwards that her real name was Jackson; how that may be I cannot say, but this clearly appears that Mr. Buxton understood it to be so, because when he gave in the bonds to be published at Iver the year following he described her as Isabella Jackson, therefore he certainly understood at that time that the name of this person was Jackson.

Lastly, when nearly a year after the Roman Catholic marriage she comes to this marriage she again appears by the name of Jackson, she is proclaimed in the banns and married under that name.

Then taking all this evidence together, that it was the name of her mother, that it was the name impressed upon her at her birth, that she has used that name in the most solemn acts of her life civil and religious, and at various periods of her life, which has not been a long one; I say, taking that evidence and comparing it with the evidence on the other side, which embraces only a very short period of her life, the Court would not be warranted to say upon this evidence that Jackson is so clearly demonstrated to be the untrue name of this person if she did possess a true name as to destroy the validity of the marriage. I am the less disposed to sustain the objection to the validity because Mr. Wakefield has his remedy; if it is a nul-

The great question therefore is, whether the marriage is valid or not? and this doubtless is a fact which may be put in issue. It was so held in (b) *Copps v. Follon*; in that case the marriage was

lity upon this ground it is a nullity ipso facto and ipso jure under the statute, and which may be pleaded upon any occasion in which she claims to be considered as his wife; it is a matter which may be put in issue and may be established upon other evidence; but upon this evidence I am clearly of opinion that the name of Jackson is not demonstrated to be other than the true name of the party, and therefore I dismiss her from all other observations of justice in this cause.

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(b) Prerog. Hilary Term, Feb. 6, 1794, *Copps v. Follon*.

On the admission of an allegation.

JUDGMENT.

SIR WILLIAM WYNNE.

The allegation propounds a marriage between James Follon and Mary Deacon; it pleads courtship, and that they were married at St. Leonard's, Shoreditch, pursuant to banns regularly published; but that in the entry of the banns in the register it was said to be solemnized by banns published between James Fanon and Mary Deacon; that it was so entered by the minister, but that it was signed by the man James Follon his true name.

But it is alleged that the banns were regularly published; then they were so by the right name; there is nothing to shew the Court that they were not; the minister might mistake in entering; the Court will not presume an improper publication, and it is alleged to be regular. The parties take upon themselves to prove the identity; the courtship, cohabitation, and issue, are pleaded; the entry will not void the * marriage.

I shall admit the allegation.

* In Michaelmas Term, (viz. December 13,) 1794, the case came on to be heard on the evidence. The marriage was proved, and the administration granted.

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by banns, but the entry recited that they had been published under the names of James Fanon and Mary Deacon, whereas Follon was the true name of the man, and so it was subscribed to the entry of the marriage. The Court admitted the allegation pleading the marriage; indeed it would be strange if such an allegation were not admissible, for the act of parliament declares the marriage, if the banns are not duly published, to be void to all intents and purposes whatsoever.

Here a right depends upon the marriage, banns are pleaded to have been unduly published under a false name, it is not admitted that the name of Langley was even a name acquired by reputation, illegitimate children as often go by the name of the mother as by that of the putative father, she would probably have passed by her mother's name that of Burt, but here a new name of reputation is acquired and that at a very early age; the time indeed is not precisely specified, but it is alleged to be shortly after her mother swore the child to Langley, and it is pleaded that she was not known by any other name than that of Bannister, which became her name of reputation and habit; if this turns out to be so, the publication of her banns under the name of Langley must have been a complete evasion of the act of Parliament; no person would know her by that name, and the law certainly requires a publication by the name under which the party is known; the intended marriage must be publicly notified, and can only be notified by using the name by which the party is known; it is not necessary to decide what would be the

effect of using the name of her lawful parents, whether it would be a true name within the meaning of the act where a different name had been acquired by reputation, but there can be no doubt but that a name acquired by reputation may be superseded by another name of habit and reputation; this was so held in the case of (c) *Frankland v. Nicholson*, where the Court (d) said, "There must be the true name, a notification of the person by a proper description; a name may possibly be acquired by reputation and habit which may supersede the original name; there may be cases where the publication of the real name would defeat the object of the statute; if such a case were made out, I might hold that the name of habit was a sufficient publication."

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In my note of this case the Court is not recorded to have said expressly that the publication by the original name would not be a due publication, but the reasoning goes to that extent, and so indeed does the principle in that case, the Court was of opinion that the name of Ross had not been acquired even by reputation, but that it had been falsely and fraudulently assumed.

In the present case Bannister is the only name by which the party was known, so at least it is pleaded, and the name too by which she had con-

(c) A cause of nullity of marriage, decided in the Consistorial Court of London, Easter Term, May 29, 1804, the woman's real name was Nicholson; but she had passed herself to the man under the name of Ross, and by this name her banns had been published.

(d) SIR WILLIAM SCOTT.

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stantly passed from her earliest infancy; the banns were published by the name of Langley; if so, this would be no notification, for she was never known by or acquired the name of Langley.(e)

How the facts of the case may turn out it is impossible for the Court to anticipate; at present I can only say that sufficient ground is laid for the admission of this allegation.(f)

(e) In — *v. Longley*, before the commissary of Surry, Easter Term, 1794, the banns were published by the name of Long instead of Longley, and in a parish to which the parties did not belong; this was held to be a false and fraudulent publication, and the marriage pronounced to be null and void.

(f) This allegation was not substantiated by proof. The cause came to a final hearing in Hilary Term, 1811, when it clearly appeared that, though the party deceased after the marriage of her natural mother with George Bannister went to live with and was brought up by her and her husband, yet that she never assumed nor was ever called by the name of Bannister, but, on the contrary, from her youth till the day of her marriage had constantly passed and was known only by the name of Amelia Langley.

Accordingly the interest of Brockley was pronounced for, and administration decreed to him as lawful husband of the deceased.

TREVELYAN v. TREVELYAN.

1810.
Trinity
Term.
 July 18.

EDWARD TREVELYAN, Esq. died at Clifton, on the 13th September, 1807; no will was found to be in existence at the time of his death, but it was pleaded that his will had been destroyed during his life time without his knowledge.

A will destroyed in the lifetime of the testator, but without his knowledge; substantiated and admitted to proof.

The two following codicils were before the Court,

" I bequeath whatever money I die possessed of in my former will,
 not disposed of, the produce of my
 " sessed of, as well commissions in his Majesty's service, as whatever may be in my
 " agent's hands, or elsewhere due to me, in
 " share and share alike between my brothers
 " Walter and George Trevelyan after paying
 " my just debts; my fishing rods and dogs to
 " Stackpoole; my curricule and horses to Walter and George, these having to pay my
 and brood mare
 " debts; my two colts to Stackpoole. I desire
 " that Richards my late servant a soldier in
 " the same regiment with myself may have his
 " discharge purchased for him if he wishes it.

September 10th, 1807.

" Witness,

" ED. TREVELYAN.

" Ann Bowsher,

" Grace Barton.

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“ To my late servant Richards, as well as
“ his discharge, I bequeath all the cloaths,
“ regimentals, or otherwise, I may die pos-
“ sessed of; and to Stackpoole my guns.
“ *Ann Bowsher.* “ E. TREVELYAN.”
“ September 10th, 1807.

Mr. GORDON deposed,

“ That he was intimately acquainted with the deceased ; that to the best of his recollection as to time, on the 22nd of June, 1807, he dined at the Rev. George Trevelyan's, at the parsonage at Nettlecombe, and he thinks Miss Lyttelton and Lady Elizabeth Percival were there on a visit, and the deceased was also of the party ; when the ladies had left the room after dinner the conversation turned upon the deceased's brother's the Rev. Geo. Trevelyan's children, and the deponent observed that Henry Trevelyan one of them, who was the godson of the deceased and also of the deponent, was a fine child, the deceased agreed with him ; after talking for some time of the child, the deponent laughing said, if the deceased would leave Henry his heir, he would leave him also £1000 ; the deceased agreed to this, and the deponent called for pen, ink, and paper, and made the deceased's will, and witnessed it. To the best of his recollection the will was as follows,

‘ This is the last will and testament of Ed-
ward Trevelyan of His Majesty's first regi-
ment of Foot Guards ; I give bequeath and
devise all my property both real and per-

‘sonal wherever and whatsoever unto my dear
 ‘godson Henry Trevelyan, the son of my
 ‘brother George Trevelyan of Nettlecombe;
 ‘and I appoint the said Henry Trevelyan my
 ‘godson my residuary legatee.’

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“That having made this will, he read the same all over to the deceased; that the deceased understood it, and approved of it, and set and subscribed his name thereto in the presence of the deponent, who also subscribed his name to it as a witness; that during this proceeding the Rev. George Trevelyan reprimanded both the deceased and the deponent for their folly and left the room; that on tea being announced they joined the ladies, and upon entering the room the deceased observed, ‘We have made a man of Henry,’ and they all laughed, but no one was told of the particulars of the will; that upon the deponent’s return to his house he began to reflect that the joke had been carried to a sufficient length, and that it was incumbent on him to destroy the will, supposing the deceased not really serious, and he accordingly destroyed it; that he destroyed it unknown to the deceased, but whether the deceased did or did not remain ignorant thereof till his death he cannot say, as he the deponent never affected the least concealment of his having destroyed the same.”

WILLIAM STACKPOOLE deposed,

“That when the deceased was lying in his last illness at Clifton he was with him, as were also his brother the Rev. Walter Trevelyan and his wife; and Mr. Walter Trevelyan suggested to

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the deponent the propriety of his brother's making his will; upon which the deponent immediately went into the room and mentioned it to him, to which he replied that he had made his will when he was ill two years before in Somersetshire, which was written out by Gordon, and that it was in favour of one of his brother George's children to whom he was godfather, that Mr. Gordon had compounded in case he made him his heir to add £1000 to it; to which the deponent replied, the produce of his commission he thought nevertheless undisposed of, or any pay that might be due to him; therefore he took pen ink and paper, and drew the first codicil in question." Mr. Stackpoole then proceeded to depose in the fullest manner to the deceased's approbation and signature of the codicil, and continued his evidence thus, "That the deponent then went into the next room, where were Mr. and Mrs. Walter Trevelyan, and read to them the codicil, when it occurred to the deponent that it made no mention of the will the deceased had often and so lately said he had executed and left with a Mr. Gordon, and that he had not bequeathed his clothes of which he usually had a great many. He therefore returned to the deceased and put the following questions to him by way of ascertaining his recollection in the presence of Ann Bowsher his nurse, all of which he had repeatedly solved to the deponent; 'Where is your will? at Edward's?' 'At Mr. Gordon's, a particular friend of George's, in Somersetshire.' 'Is it the will you have before mentioned to me to have been drawn by Mr.

'Gordon?' 'Yes. The contents I have often told you of;' or words to that effect. 'Is it your intention that this should interfere in any way with that?' 'No; certainly not;' or words fully to that effect. That the deponent immediately made the interlineation 'not disposed of in my former will,' and asked the deceased whether such were his intention; to which he replied, 'Yes.'" Mr. Stackpoole then deposed to the writing and execution of the second codicil of the 10th September, 1807.

ANN BOWSER, nurse of the deceased,
Spoke to the attestation of the two codicils above mentioned.

JUDGMENT.

Sir JOHN NICHOLL.

There can be no doubt in law that if a will duly executed is destroyed in the lifetime of the testator without his authority it may be established upon satisfactory proof being given of its having been so destroyed, also of its contents.

The question then comes to the facts, and in this case there is abundant proof of the execution and contents of the instrument, as well as of the destruction of it without the authority or knowledge of the deceased. It is not necessary to decide whether the Court could receive evidence against the fact of execution on the ground that the transaction was throughout a jest; it would be very dangerous to admit any such evidence of intention against the act; though there might be such a possible case, especially if the paper itself

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contained any thing ludicrous or absurd in its dispositions ; against this instrument this species of argument cannot be maintained with effect, for the property is bequeathed to the testator's own nephew and godson.

It appears also from the evidence of Mr. Stackpoole that the deceased was very serious in this disposition of his property ; the codicils too are a complete recognition and proof also that he had no knowledge or idea of the destruction of the paper.

Under such proof the Court is bound to pronounce for the will " as contained in the deposition of the witness ;" (this is the mode I believe which has been adopted on similar occasions ;) and for the two codicils which are sufficiently proved.

DABBS v. CHISMAN.
and
JENNENS v. BEAUCHAMP.

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THESE two cases, differing in their circumstances and wholly unconnected with each other, yet as involving the same rule of practice, were argued at the same time.

A person in possession of an administration is not bound to propound his interest till the party calling in question the grant has first propounded and proved his.

In the first, viz. that of *Dabbs v. Chisman*, Elizabeth Moore was the party deceased; she had died a widow in June, 1806, having executed a will and codicil; but appointed neither executor nor residuary legatee; suit was contested between Chisman and Lygett each claiming to be her nearest relation; pleas were given in and witnesses examined on both sides; and in June, 1807, the Court pronounced for the interest of Chisman as cousin german and next of kin to the deceased, and he took out an administration to the effects with the will and codicil annexed.

Prerog.
June 26,
1807.

In Michaelmas Term, 1809, the present cause was instituted by Elizabeth Dabbs, who asserted herself to be a second cousin of the deceased, and called upon Chisman to propound his interest. The question now was whether the Court would call upon Chisman to propound his interest before it decided that Dabbs had proved hers?

In *Jennens v. Lord Beauchamp*, William Jennens died in July, 1798, possessed of a consider-

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able landed estate and an immense personal property ; he left a will by which he disposed of his freehold estates, but it contained no bequest relative to his personal property, nor did he appoint any executor or residuary legatee. Accordingly, letters of administration with the will annexed were granted to William Lygon, Esq. (since created Baron Beauchamp,) and the dowager Viscountess Andover as cousins german once removed and the only next of kin entitled in distribution, and they continued in undisturbed possession of the administration till May, 1810, when the present suit was instituted and Lord Beauchamp the surviving (a) administrator was cited to bring the administration into Court at the prayer of several persons of the name of Jennens, who denied the interest of Lord Beauchamp and Lady Andover, and asserted themselves to be cousins german thrice removed of the deceased.

The question in this, as in the other case, was, whether the administrators were liable to be called upon to propound their interest before the other parties had propounded and proved theirs ?

Adams, Stoddart, and Jenner, for the parties calling in the administrations.

The general practice in an interest cause is that the parties should be brought before the Court *pari passu* ; thus if any one in the possession of an administration is called upon to bring it in at the suit of a person having an interest, whether

(a) Lady Andover had died leaving her daughter, the Hon. Frances Howard, (wife of Richard Howard, Esq.) her sole executrix.

that interest be more or less remote than his, the administrator is bound to shew and to propound his interest.

COURT.

Have you found any case where the administrator has been compelled to give in an allegation and to proceed *pari passu* with the adverse party?

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Argument resumed.

No case perhaps precisely to that point, but it is a general rule that in interest causes allegations shall be exchanged and the parties proceed *pari passu*; we rely upon the general rule. It is for the other party who except against the application of it in cases where the administration has been already granted to support their application by precedent.

Swabey and Phillimore contra,

Stated their apprehension both of principle and practice to be completely at variance with the doctrine laid down on the other side. Any person who is possessed of an administration whether obtained *foro contradictorio* or not, has a judicial authority for his acts, and is to be considered in law as a *bonæ fidei* possessor. *Qui certat iudice auctore bonæ fidei possessor est.* This doctrine has been recognized in many cases in this Court; in *Hibben v. Calenberg, Prerog.* 1754; *King v. Kindleside, Prerog.* 1764; *Forrest v. Wilson, Prerog.* 1766; *Jones v. Chapman, Prerog.* 1766; *Osborne v. Golding, Prerog.* 1768; *Cecil's case, Prerog.* 1784. And it was held in *Elme v. Da Costa, Prerog.* 1791. that where an administration

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had been granted to a creditor he acquired the same right to oppose as the next of kin would have had, had he obtained possession of the grant. These cases fully support the rule, which has its foundation in the favour with which the law views a possessory right; possession is presumption of a legal title not to be ousted till a superior title is shewn.

JUDGMENT.

SIR JOHN NICHOLL.

An important rule of practice is involved in the decision of these two cases. I have thought it advisable to take them together as they do not materially vary; in the one the interest of the party has been propounded, and pronounced for, but against other persons than those now contesting the suit; in the other the administrators have been in possession of the grant of the administration upwards of ten years. In both cases therefore there is a strong presumption in favour of the interest; in both a long acquiescence on the part of those persons who now call in the administration.

The question for consideration is whether under such circumstances the administrators are liable to be called upon to propound their interest, before the parties calling it in question shall have propounded and proved their own?

It has been asserted on one side that by the uniform practice of this Court where both interests are denied both parties are bound to bring in their allegations and to exchange them at the same time; this has been admitted on the other side where both the parties appear before there has been any grant of an administration; but where there has

been such a grant, and the parties contesting it appear long subsequent to the issue of it, it has been contended that they must satisfactorily shew that they have an interest themselves, before they can require the party possessing the administration to propound his interest and give in an allegation.

The general rule indeed can hardly be denied that where two parties appear before any administration has been granted, both are to propound their interests and to proceed *pari passu*; and this whether the mutual interests are denied, or whether an interest is denied and the will opposed; nor does the rule vary whether the asserted next of kin are in the same or in different degrees of relationship.

In *Waller (a) and Smith v. Heseltine and v. Burgh*, the Court decided that the question concerning a will, and the question of interest between the Crown and the next of kin, must all go on together; but this was a case where no administration had been granted, the question here is whether the same rule obtains where an administration has been granted? and upon all the search and inquiry I can make I find no such rule.

In point of principle the Court considers the administrator as a favoured person; in many instances he stands on a different ground from a person not invested with that character; a creditor cannot deny an interest or oppose a will, but a creditor in possession of an administration may do

(a) Prerog. March 31, 1789. See this case reported next to that of *Hibben v. Calemborg*.

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both, and he is not bound to bring in the administration till an admissible allegation has been brought in either propounding a will or propounding an interest. It was so laid down by the Court in *Elme v. Da Costa* (b); Mrs. March's case has been referred to, and is to the same effect; so is that of *Norman v. Bourne*, Prerog. 1714; I am in possession also of a manuscript note of Sir Edward Simpsons (c), which lays it down that where the administration has been granted to a creditor, he is the same to oppose a will as the next of kin.

These cases shew that an administrator stands on a more favoured footing than a person who is not clothed with that character. It has been said that they must proceed *pari passu*; but the very requisite of an admissible allegation proves that it is not *pari passu*, for it removes part of the ordinary precaution, which is to exchange cases before there is any disclosure of the facts pleaded; the cases cited prove this point, and seem hardly denied.

But I find an old case more in point *Hibben v. Calemberg* (d), before the Delegates, 1757. Ge-

(b) Prerog. 1791. the Reader will find a full report of this case after that of *Waller and Smith v. Heseltine and v. Burgh*.

(c) The following is an exact transcript of the manuscript note referred to; the marginal observation is also Sir Edward Simpson's.

Creditor having adn. may oppose will without costs, so may extr. having probate and oppose latter will.

Adn. granted to a creditor, a will being produced he opposes it; a commission to Jamaica to prove it, he gives no allegation; he has the same right to oppose without being subject to costs, as where opposed by next of kin; the same where an executor having probate opposes a later will.

(d) See the next case.

neral Frampton was the party deceased, Mary Grace set up a paper as his will, Lady *Calemberg* (e) as first cousin once removed opposed this will; Grace admitted her interest; after a long litigation the Court pronounced against the will, and decreed administration to Lady *Calemberg*. The case was appealed to the Delegates, the sentence was affirmed and the cause remitted. A suit was then commenced by Hibben against Lady *Calemberg*, who alleged herself to be a sister by the half blood, and claimed the administration; Lady *Calemberg* denied her interest; and she would have denied Lady *Calemberg's* interest, but as that had been admitted in the contest concerning the will, (in which Hibben had not intervened to oppose her interest,) and been pronounced for by this Court on Grace's admission, and as that sentence had been affirmed by the Delegates, the Court thought it was *res adjudicata* that Lady *Calemberg* was cousin german once removed and next of kin unless it could clearly be shewn that the deceased had left a nearer relation, and consequently that Lady *Calemberg* was not liable to be called upon to prove her interest.

Though I find it difficult to agree in all the reasoning of the learned person (f) from whose ma-

(e) In Sir George Lee's manuscript note of this case the party is called Mrs. *Calemberg*; but as the learned Judge cites also from the manuscript notes of a person to whom the decision must have been familiar, I have not thought myself at liberty to vary the appellation, the more especially as the inaccuracy, if it be one, is wholly immaterial; it may have been that she became Lady *Calemberg* at a subsequent period.

(f) Dr. Andrews.

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manuscripts I have derived this case as to the principles of the decision; yet the decision itself establishes that the Court will not in all cases put a party in possession of an administration upon proof of interest *pari passu*.

Not because the interest could be considered as finally established by the admission of a party setting up a will, and who therefore had no interest but under the will; nor in a suit to which the person after claiming to be next of kin was no party; nor by the decision of the Court when the question at issue was not who was next of kin, but whether the deceased died testate or intestate; but the Court expressly decided that the party who had been in possession of the administration for a great length of time, during which the asserted next of kin had not intervened was not now to be put upon the proof of her interest in the first instance, nor till the interest of the adverse party has been decided upon; for the Court decided finally that Hibben had failed in proof of her interest, during which suit Lady Calemberg was never called upon to prove hers.

The true principle I take to be, *first*, the presumption of law that that which the Court has done has *prima facie* been rightly done, and shall not be questioned till it becomes absolutely necessary. *Secondly*, a presumption of fact arising from the acquiescence of the adverse party from the circumstance of his not intervening in the suit, or his not raising the question for such a length of time.

In the case referred to, Lady Calemberg could

never have been put upon the proof of her interest by Hibben; for if Hibben had established hers being nearer in degree to the deceased, Lady Calenberg's interest must have been extinguished; if, on the other hand, Hibben should fail, as she eventually did, to establish her interest, then the former administration remained in force, she having no right to call in question that administration.

*Forrest v. Wilson (g)* was in effect the same decision; the Court said that "the administratrix" had been ill advised to propound her interest before her opponent had established hers;" this therefore goes a great way to shew that she was not under the necessity of propounding her interest till the adverse party had proved hers.

In the present case the interest asserted is a more remote one, therefore when established will not decide the question, it will only then have established a right to put the other party upon the proof of the nearer interest; but still the principle is the same, namely, that you shall not question the right of the party in possession till you have established your own interest either by admission or proof.

It is said however that if the nearer interest is well founded it would be unnecessary to prove the more remote; but that argument proves too much, for it would go the length of establishing that where no administration has yet been granted the remote interest is not to go on *pari passu* with the nearer one; second cousin would say, Why should

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I go to the expense of proving my interest? for if my opponent establishes himself as first cousin *cadit quæstio*, it is immaterial whether I am a second cousin or not; yet no such rule as this is pretended to exist, that the nearer interest must be pleaded and proved before the more remote; the case of Cecil (*h*) is satisfactory as to that point; the widow did not propound her interest; the next of kin propounded and proved theirs; the Judge *after deliberation* was of opinion that the widow was at liberty to propound hers. As to its being more convenient that both should go on together, that may be so or not according to the event; but if any inconvenience arises, to whom is it imputable but to the party who has lain by for years? certainly not to the party who has obtained the administration in the regular course, who has been possessed of it for a great length of time, and possibly may have administered the whole estate.

I beg to be understood as by no means deciding that a person in possession of an administration may under no circumstances be obliged to proceed *pari passu*, or that the Court would in no case vary its rule: there may be special circumstances where the privilege would not attach, but public inconvenience would be great if parties were liable to be thus called upon at any period by those who may have no interest whatever in the effects. If the administrator denies the interest, he does it at some peril of costs; he may also do it at some inconvenience to himself, that of delay, for if the

(*h*) Prerog. 1784.

adverse interest should be established, he will be liable to be put on the proof of his own after considerable loss of time, for I think it cannot be maintained that possession of an administration obtained without others being parties either actually or virtually to the grant can conclude those parties; indeed this is admitted by the very circumstance of putting the other party upon proof of the interest.

On the best consideration that I have been able to give this important point of practice, and from the best researches and inquiries that I have been able to make into it, I am disposed to hold that where administrations have been regularly and fairly granted, and where there has been delay in the party opposing them, the administrator is not bound to propound his interest till the interest of the adverse party is established, and it being a matter within the legal discretion of the Court; the interest in one of these cases having been actually propounded and pronounced for by the Court in another cause, and in the other the administrator having been in possession of the grant above ten years, I shall put neither of them upon proof of their interest till the adverse parties have established their own.

1810.  
*Michaelmas*  
*Term.*

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DABBS
v.
CHISMAN.
and
JENNENS
v.
LORD
BEAUCHAMP.

1764.
Trinity
Term.
 July 10.

HIBBEN v. CALEMBERG. (a)

A party in possession of an administration not bound to propound her interest till the party calling it in question has established her own.

Dr. Simpson for Hibben.

Hibben prays that Calemberg may proceed to propound her interest and give in an allegation for that purpose, otherwise that administration to General Frampton may be granted to her as sister of the half blood and next of kin. In a former cause Mrs. Henrietta Calemberg as cousin german once removed opposed the deceased's will which was propounded by Mrs. Grace as executrix; the will was pronounced against in this Court and administration decreed to Calemberg who was confessed by Grace to be next of kin; Grace appealed from this sen-

(a) The Editor is indebted to the kindness and liberality of the Rev. Sir George Lee, Bart. of Hartwell (Bucks), the great nephew of the eminent Judge whose names he bears, for the report which he is enabled to lay before his Readers of this case; it is literally transcribed from a book in which Sir George Lee, while he filled the situations of Dean of the Arches and Judge of the Prerogative Court of Canterbury, was in the habit of recording with his own hand, not only his decisions and the grounds on which they were founded, but an abstract of the most stringent parts of the evidence, and of the arguments which had been adduced by counsel on the one side and the other in support of the respective parties contesting the suit.

The value of so authentic a record of the principles on which this decision rested is considerably enhanced by the great importance attached to the authority of this case by the Court in giving its judgment in the preceding cases of *Dabbs v. Chisman* and *Jennens v. Lord Beauchamp*.

tence, and it was affirmed by the Delegates. The present cause began between Hibben and Calemberg by a caveat entered by Sherman a creditor; Hibben warned it, and prayed the administration to be granted to her as sister; Tyndall voluntarily interposed, and alleged Calemberg to be the deceased's first cousin once removed and next of kin, and that administration was decreed to her; and prayed Hibben's answer: Caesar for Hibben denied Calemberg's interest; Tyndall said he would propound Calemberg's interest, and denied Hibben's: The Judge assigned to hear on the admission of Tyndall's allegation; Tyndall now says his client is in possession of a decree for the administration, and he is not bound to propound her interest; we say Calemberg's interest was never in debate in the former cause, and that Hibben was no party to that cause, and that the decree of the administration to Calemberg was only a common decree; we insist that both by law and the assignments of the Court, Tyndall is obliged to propound his client's interest, and that we have a right to what we pray.

Dr. Jenner for Calemberg.

Administration was decreed to Calemberg, and that decree affirmed in the Delegates; the remission was brought in, and the Court decreed to proceed according to the tenor of former acts. Hibben then prayed administration; the parties mutually denied each others' interest; Calemberg was thereby admitted to be a contradictor: The Court has made no assignation on us to propound our in-

1754:
Trinity
Term.

HIBBEN
v.
CALEMBERG.

1754.
Trinity
Term.

HIBBEN
v.
CALEMBERG.

terest, we have an allegation drawn but are not obliged to give it in.

The acts were then read, viz.

By—day after Hilary Term, 28th February, 1754, on the remission being brought in, the Court decreed to proceed according to the form of former acts; Tyndall alleged his client to be cousin german once removed to the deceased, and that administration had been decreed to her; both proctors denied each other's interest.

April 4th, Tyndall asserted that he gave an allegation.

First Session of Easter Term on admission of Tyndall's allegation, the Judge admitted Cæsar's allegation, and continued the assignation as to Tyndall's allegation.

Fourth Session of Easter Term, Tyndall declared he waved giving any allegation at present, on petition of both proctors.

Dr. Simpson in reply.

There are three questions, 1st, whether we have not a right by law to call Calemberg to propound her interest; 2nd, whether her proctor is not bound by the assignations of the Court to propound it; 3dly, if she does not propound it, whether we have not a right by law to have the administration.

The former cause cannot affect Hibben, because she was not a party; administration was decreed to Calemberg on an assertion only that she was next of kin, no proof was made thereof, that decree is incomplete because administration was not

under seal and may be reversed ; we shall be entitled to administration if we shew never so remote a relationship because Calemberg has shewn no relationship. On the 4th of April, the Court assigned to hear on the admission of Tyndall's allegation which was to propound Calemberg's interest.

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v.
CALEMBERG.

Dr. Simpson also, with Dr. Pinfold, and Dr. Hay, (who were counsel with him,) insisted much that although when a person is in actual possession of letters of administration under seal he may not be obliged to propound his interest, yet in this case the matter is *res integra*, because the Court has gone no further than to decree administration to be granted to Calemberg.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion that Tyndall was not obliged by the assignments of the Court to propound his client's interest ; I had not ordered him to do so, I had only assigned to hear on the admission of an allegation which he asserted he would give, but notwithstanding that assertion he was at liberty to alter his mind and not give it. *Secondly*, I was of opinion that he was not obliged by law, because my sentence which decreed the administration to Mrs. Calemberg was become irreversible, it having been confirmed by the Court of Delegates, whose decree was a bar to all the world against objecting to Calemberg's right to have the administration, unless a nearer relationship than she claimed should be proved ; indeed, if Hibben can prove herself to be sister to the deceased, the decree for

1754.
Trinity
Term.

HIBBEN
v.

CALEMBERG.

the administration both in this Court and the Delegates will be void by the statute which precisely requires the ordinary to grant administration to the next of kin ; but unless Hibben proves herself to be nearer of kin to the deceased than Calemberg suggests herself to be, the decree of the administration to Calemberg must stand unshaken and administration cannot be granted to any one else, and consequently it is quite unnecessary for Calemberg's proctor to propound her interest which is established by a sentence of the Superior Court, and therefore I rejected Cæsar's petition.

He protested of appealing, but did not appeal.

Prerogative
1789.
March 31.

WALLER & SMYTH v. HESELTINE v. BURGH.

Parties propounding different interests to proceed *pari passu*.

THE Crown claimed the goods of John Newport deceased, a bastard ; Waller and Smyth claimed them as executors of Smyth his next of kin, and Burgh appeared and propounded a will. The Crown and the executors of the next of kin now prayed the Court to suspend any proceedings between them till it had decided on the validity of the will.

Sir William Scott (King's Advocate) for the Crown.

If the will should be proved the claim of the Crown and of the next of kin would alike be anni-

hilated; they depend alike only on the supposition of an intestacy; it is but reasonable that these parties should not go on trying a question, which if the will should be established would affect no one, but be a mere speculative question; the only question between the Crown and the next of kin is the illegitimacy of the party, which is so different from the other point that the party propounding the will can derive no benefit from the discussion of it.

1789.
Trinity
Term.
WALLER
&
SMYTH
v.
HESLTING
v.
BURGH.

Dr. Battine in support of the will.

In the evidence now taken, of which publication is prayed, facts may come out of advantage to the party propounding the will, particularly if they should shew the age of the party, and the time when the commission of lunacy was taken out, the parties must prove their own interest before they are allowed to oppose the will; they cannot both have an interest; if one has it is clear the other has not.

Dr. Harris and Dr. Arnold for the executors of the next of kin,

Joined in the prayer of the counsel for the Crown, and contended that these proceedings were analogous to those in the Prize Court, where in the first instance when an appearance is given for a joint captor the Court condemns the ship, generally reserving the question to whom.

JUDGMENT.

SIR WILLIAM WYNNE.

The first appearance here was for the next of kin; the Crown then claimed; and afterwards an appearance was given for a person claiming to be executor under a will. An allegation has been given in by the King's proctor, and witnesses have

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Term.



WALLER
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SMYTH
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HESELTINE
v.
BURGH.

been examined, and now there is a prayer to suspend proceedings between the Crown and the next of kin till the validity of the will shall be determined.

It is necessary therefore for the Court to consider whether this prayer is according to the usual form of practice? the interest of all has been propounded, or the Court could not have proceeded; if the will had been produced at first, and caveats had been entered, the parties who had then appeared must have propounded their interest before they could oppose, or oblige the other party to proceed. If there are two wills, the executor of the first cannot call upon the executor of the other to prove the latter without propounding his own interest. In *Adams v. Adams* the will was propounded by the residuary legatee, and opposed by a person claiming as brother; the brother required the residuary legatee to propound the will; this was denied because the brother's interest had not been pronounced for; the Court ordered them to proceed *pari passu*.

Here the proceedings commenced between the Crown and the next of kin; the executor comes after, and finding the interest between the parties denied, has a right to consider it so, they have no interest in the cause longer than they are at issue; but the interest being propounded the Court is now desired to suspend proceedings. The suspending the interest would be much as if it had not been propounded at all; if it should be suspended and cease to be at issue the party propounding the will might ask, what right have you to oppose or demand probate? The cause having been six

years in contest they pray to lay their finger on one part and go on with that. The whole cause must be taken together; this petition cannot be granted; the manner of proceeding precludes making the objection at first, but the giving in the allegation and examining the witnesses and then applying to have the contest suspended seems to be an afterthought.

It has been argued that the party should not give evidence against herself; but all the evidence in the cause is the evidence of all parties; the suspending a part of the case so as only to affect one of the parties is not agreeable to practice.

I shall reject the application.

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Trinity
Term.

WALLER
&
SMYTH
v.
HESELTINE
v.
BURGH.

ELME v. DA COSTA.

Prerogative
Court.
1791.

LOUIS Nicolini died in 1783, a foreigner, leaving two daughters. In June, 1786, administration of his effects was granted to Da Costa a creditor; the daughters having been cited to see proceedings in the usual manner. In February, 1787, Da Costa filed a bill in Chancery to recover effects, &c.; the cause was set down for hearing. In May, 1790, a citation issued against him from the Prerogative Court to produce a will which he had had two years in his possession not signed by the testator; in answer to this he appeared, and prayed to be dismissed, or to

A creditor in possession of a grant of administration entitled to contest suit against a person asserting himself to be next of kin.

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ELME

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DA COSTA.

be admitted a contradictor to the will, and to keep the administration till the suit in Chancery should be determined; it was replied that he was bound to bring in the administration and had no right to be a contradictor; that the administration had been fraudulently obtained as he had taken an oath that the deceased had died intestate, whereas a will was produced; besides there were next of kin, the deceased having left two daughters, and though they were dead, one of them had left children.

Sir William Scott and Dr. Nicholl.

The creditor in possession of the administration is entitled to be admitted a contradictor to make the party prove the will; it was so held where administration was claimed by the next of kin against a creditor in Mrs. March's case, viz. Schwartz a German died; upon an affidavit of his intestacy administration was granted to Robinson a creditor, after the same steps which have been taken here, a citation issued against him to bring in the administration and shew cause why it should not be granted to the next of kin, and the creditor was admitted to defend his cause by putting the next of kin on proof of his interest; besides in the present case there is nothing to shew that it was the will of the deceased or that there may not have been a later will; there should be a probate from the foreign Court; it may not be valid according to the form required in the country where the deceased died.

Dr. Harris and Dr. Swabey contra.

The question is whether the administration is void or not? all persons interested were not cited,

viz. the children of the deceased's daughter ; whether this omission was owing to fraud or negligence the effect is the same ; it must void the administration following such a citation ; a creditor has no right to contradict the will or oppose the next of kin ; it is said that the Court must enquire whether it is a good will in the place where it is made, but if it is good jure gentium that will suffice. The administration has been ill granted as it was grounded on a general citation on the Royal Exchange without any actual notice to the party ; it is within our own memory that notices used to be sent to the place where the parties entitled in distribution were resident, and if no answer were returned within a reasonable time the administration was then granted ; and with respect to foreigners the method practised was that of giving notice to the resident minister of the country to which they belonged.

In *Lisdale v. Baloo* the party died intestate, Baloo took out a process, it was served on the Royal Exchange, and no appearance being given the administration was granted to him ; six months afterwards a niece of the deceased cited Baloo to shew cause why it should not be revoked, as it was not rightly taken out on the general process since notice should have been given to the niece who lived at Rochelle as he knew for he had corresponded with her, and the Court (Dr. Bettesworth) said " that the administration should not have been granted on a general service without particular notice when it was known where the parties resided."

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In *Blake v. Hartwell*, Prerog. 1750, an administration viis et modis without any original citation was revoked on that ground only.

JUDGMENT.

SIR WILLIAM WYNNE.

This is a process to compel a party to bring in an administration and shew cause why probate should not be granted of a will produced ; an appearance is given under a protest to the regularity of the proceedings ; the administration issued on the non-appearance of the daughters of the deceased after a public citation.

Two questions have been argued,

First, that the administration was void originally ;

Secondly, that if it was not void originally, still that a creditor has no right to deny a will, and therefore the administration must be revoked.

With respect to the first point, the objection is that there has been no other than a general citation, and it is said that the practice has been otherwise lately ; but this administration was granted sometime ago, and I suppose according to what was then considered the practice of the office ; but it is worthy the attention, and shall occupy the attention of the Court, whether this method shall or shall not be adopted ; it is laid down in books, and is not to be denied, that parties may be put in contempt by a public citation only ; it was according to the practice of the office when it was done here, therefore the objection does not hold ; the citation was taken out not by the next of kin, but by the executors.

The effect of the decree is to bring in the administration and shew cause why it should not be revoked and probate granted of the will. It is evident that the administration must be brought in on the exhibition of a will; bond is required by stat. 22 & 23 Car. II.: can the Court say, because the will was not brought in as soon as it might have been, that therefore the party is barred from proving it? the Court has no such authority.

In the present case it was not done by surprise, the administration was not applied for till three years after the death of the party; and the administrator has commenced and carried on a suit in chancery: a conspiracy is suggested by which the will was produced; but the Court cannot attend to this suggestion. If the will is proved the administration must be revoked; but the question is what can be done now? the administrator must bring in the administration; but the Court will not go any further; it will not revoke an administration on the mere suggestion of a will, when the administrator has been a long time in possession of the grant; this would open the door to fraud.

The right of a creditor is only this; he cannot be paid his debt till a representation to the deceased is made; he can then call on all who have a right to administer; before an administration is granted if a will be produced, the creditor has no right to contradict or deny it; for if there is a will, or a next of kin claims the administration, then a person offers to make himself a representative, and the creditor gets all that he has a right to. But when a creditor has obtained the administration, the case

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is different; he has a right to maintain it against the executor or the next of kin; it is not to be revoked on mere suggestion. The Court has taken pains to find a case where a will has been set up under such circumstances, but without success, which is singular; March's case as cited shews that a creditor was admitted to contradict the suggestions of the next of kin; there is no difference in the principle, and the case applies.

In *Newman v. Bourne* (a) a creditor obtained administration to be decreed to him, and before it passed the seal he was suffered to contest the interest of a person claiming under a nuncupative will; no relations appeared. That case is stronger than the present.

In a manuscript note of Sir Edward Simpson's (b) I find that where an administration is granted to a creditor, and a will is afterwards produced, he has a right to contest it in the same manner that the next of kin might have done, without being subject to costs.

This is founded on reason; whereas a contrary practice would be open to fraud; the administrator when cited must bring in the administration, but the Court will go no further; he may contest the will; whether the will is to be determined according to the laws of Florence or the laws of England is out of the question, he has a right to establish it as he can.

I decree that the creditor shall bring in the administration, but according to the terms of the citation he is at liberty to shew cause why it should not be revoked.

(a) Prerog. 1714.

(b) See page 160.

LOVEKIN AND OTHERS v. EDWARDS AND OTHERS.

1810.
*Michaelmas
Term.*

ELIZABETH COOK died on the 19th July, 1809, and left a will and codicil, in which her brothers Samuel Lovekin, John Whitehouse, and her sister Ann Whitehouse, were named executors.

A party who had been admitted to sue in formâ pauperis, dispaupered.

A caveat was entered against the will by James Lovekin another brother of the deceased; suit was contested; the executors propounded the will in a common condidit, and the subscribing witnesses were examined upon it, when James Lovekin was admitted a pauper, and an allegation was given by him in opposition to the will, on which fourteen witnesses were examined; a responsive allegation was brought in by the executors on which seventeen witnesses were examined, and publication was prayed; the executors then suspended the progress of the cause and took out a decree citing Mary Edwards a sister, and Joseph, Charles, Richard and Peter Lovekin nephews of the deceased, (and the persons entitled in distribution to her personal estate in the event of her having died intestate,) to see proceedings; the executors then *re-propounded* the will, and the witnesses were *re-examined* upon it, when Joseph Lovekin, one of the nephews cited, appeared, and upon taking the usual oath was admitted a pauper.

*July 27-
1809.*

*February
1810.*

*June 6,
1810.*

The present question arose upon the right of this person to sue in formâ pauperis; it was opposed by the executors, and on their behalf an act

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on petition was entered upon stating in effect that “ the executors having been informed that Joseph Lovekin and several of his relations were determined to vex and harass them by entering another caveat against the will and codicil as soon as the suit now prosecuting against James Lovekin should be terminated unless they (the executors) would make a compromise with them, they were advised to take out a decree against Mary, Edward, and Joseph, William, Charles, Peter, and Richard, Lovekin to appear and see the will and codicil *repropounded* ; that Joseph Lovekin had appeared and been admitted to sue in formâ pauperis, whereas they alleged that he was now and had been for upwards of six years a housekeeper and resident in his present dwelling house in Nottingham Court, Drury Lane ; that he had a plate on the door of his house with his name thereon stating him to be a carpenter ; that he occasionally acted as a master carpenter, and sometimes performed funerals ; that he paid 18*l.* a year for the rent of his house, which was assessed at the sum of 16*l.* ; that he had for several years past regularly paid all the King’s house taxes, all the poor’s rates, paving and lighting assessments, and parochial rates, assessments, and taxes of every description, and was very regular in the payment of the same, and also in the payment of his tradesmen’s bills ; that he lets some of his apartments to lodgers, for which he gets the sum of 24*l.* a year ; and that the part of his house which he occupied was furnished by himself, and the furniture was worth 50*l.* or thereabouts ; that Joseph Lovekin acted also as a jour-

neyman carpenter, and that he had been for some time past regularly employed by a cabinet maker, who pays him 1*l.* 7*s.* a week for his wages ; and they further alleged that the said Joseph Lovekin derived a sufficient income from his business and letting lodgings to support himself and his family with credit and decency, and was a person in the receipt of and possessed of property, and worth considerably more than 5*l.* after the payment of his just and lawful debts."

On the other side it was alleged in the act,

"That Joseph Lovekin did not intervene in the cause for the purpose of harassing the executors, but because he had reason to fear that they would induce James Lovekin to a compromise and to drop the proceedings in this cause against the pretended will ; it was admitted that he had been for the last five years tenant in the house he now occupied in Nottingham Court, but it was denied that he ever had a plate on the door with 'carpenter' in addition to his name, or that the word 'carpenter' was at all written on any part of his house ; or that he had at any time acted as a master carpenter, but it was admitted that when out of employ as a journeyman carpenter, he had more than once executed a job on his own account as all other journeymen do, and had occasionally provided a small funeral, but that he was still justly indebted to an undertaker in Fleet Market in the sum of 16*l.* 8*s.* 3*d.* the total amount of goods advanced for all the funerals he ever provided, save one, the account for which was 2*l.* 14*s.* 6*d.*, and which had long been settled, and that he was now unable to

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discharge the said 16*l.* 8*s.* 3*d.*; it was further admitted that he paid 18*l.* rent for his house, but, then the deduction of the land and property tax and the sewer rate was always first paid by his landlord, so that his yearly payment did not exceed 14*l.* 7*s.* 10*d.*; that he had usually paid the poor rates and other assessments and taxes, but from poverty he had not been able to pay them regularly, and that since his residence in his present house after due examination before the vestry of the parish he had been discharged and excused from the payment of the said rates on the ground of poverty; and it was admitted that he let the rooms unoccupied by himself and family, two at three shillings each, two at one and eight pence each, and one at one shilling per week, but that the rent was precarious and uncertain from the poverty of his lodgers, and because the rooms were often long untenanted, and that he could not pay his own rent without letting the lodgings; that all the furniture in the house was not worth more than 13*l.* 19*s.* 6*d.*; and it was further alleged that Joseph Lovekin was in the employ of Job Sabin, a broker, as porter to him in his business, and was now in the receipt of 1*l.* 7*s.* per week as wages; but it was denied that he was worth 5*l.* after the payment of his just debts, and alleged that he was insolvent and indebted to various persons in sums which he was unable to pay."

Several affidavits were given in, both on the one side and on the other, in support of the facts detailed in the petition.

JUDGMENT.**Sir JOHN NICHOLL.**

This is a question whether a party who has been admitted a pauper in the usual form shall now be dispaupered. Various affidavits have been gone into partly upon trivial and collateral facts, and it is not very clear whether the party is or is not insolvent; without however entering into any very minute calculation of his circumstances, which the decision of this question does not require, he seems to be a person pretty even with the world, his house rent is paid by the lodgings he lets, and his earnings as a carpenter are about 70*l.* annually; and the question is whether a party thus circumstanced is entitled to appear as a pauper?

To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself; besides it places the adverse party under great disadvantages, it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought therefore to be clearly made out. It is a complete but not an uncommon misapprehension of the law, to suppose that because a person is in insolvent circumstances, and because he can truly and conscientiously swear that he is not worth 5*l.* after all his just debts are paid, that therefore he is entitled to be admitted or rather to proceed as a pauper; it is *prima facie* ground to admit him as such but no more; if it were other-

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wise many persons living in great splendour and luxury would be so entitled ; for many persons in business in the enjoyment of an immense income and maintaining a proportionate expenditure would not be worth 5*l.* after the payment of their just debts.

The decisions however have gone on very different grounds. In *Riley v. Rivett* (b), Riley prayed to be admitted a pauper, and swore he was 1,600*l.* in debt, but admitted that his brother allowed him annually for keeping his books 100*l.* The Court decided that he was not entitled to be admitted.

In *Barham v. Barham* (c), the Court stated

(b) Before the Condelegates, 1794.

(c) Before the Consistory Court of London, June 13, 1789, a citation had been taken out by the wife against the husband in a cause of cruelty and adultery ; on the question of alimony coming before the Court the husband appeared under a protest as having been cited of a wrong parish, and prayed to be admitted a pauper. According to a note of the judgment in my possession, the Court (Sir William Scott) is reported to have said on the latter branch of the case, "The next question is whether he is to be admitted in formâ pauperis ? it is said this is not discretionary ; but that the Court must admit the fact upon oath of the party. I should be sorry if it were so, that the indulgence designed for honest poverty should be allowed immediately upon the oath being taken ; I conceive it to be otherwise ; the Court may even dispauper. Such cases have been at common law ; 2 Salkeld, p. 507 ; here the man has been brought up in a liberal profession, he had a fortune with his wife, he is healthy and able to gain an income ; one who can earn a sufficient livelihood, is not entitled to this indulgence. The Court should be particularly cautious where the remedy is sought in a case like this ; a suit for separation and alimony ; this would be at once shutting the door against redress and defeating one great object of the suit. It is stated that he received with his wife 400*l.*, says

"If a person has the means by honest exertion to acquire a competence he has no claim to be admitted a pauper. Mr. Barham in two years has expended 750*l.*, he is not the kind of person entitled to the indulgence of having the labours of others gratuitously," and over-ruled his petition to be admitted a pauper.

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In an anonymous case (*d*), in *Salkeld*, where a motion was made to dispauper a parson who was plaintiff in an action, because he had a living of 40*l.* a year, though he had sworn he was in debt more than he was worth; Chief Justice Holt was of opinion that his being indebted was no reason; it was enough that he had a considerable estate in possession.

In *Smith v. Smith* (*e*) the Court said "If a party has a current income though no permanent property he must be dispaupered; this person has about 20*l.* a year from houses, he gets about 40*l.* a year by his business as a carpenter, his whole

he is indebted 280*l.*, and is proved to have spent 700*l.* within the last two years besides what he gained by his profession. A person stating such extravagancies to the Court comes with an ill grace to ask the assistance of other men. I shall reject this application, and assign him to appear absolutely."

(*d*) [Mich. 11 Will. 3. B. R.]

Mr. Northey moved to dispauper a parson, who was plaintiff in an action, because he had a living of 40*l.* per annum. Turton and Gould Justices contra, because he swore he was in debt more than he was worth. Holt C. J. differed from them; for his being indebted, or his estate being mortgaged, is no reason; it is enough that he has a considerable estate in possession. 2 *Salkeld*, p. 507.

(*e*) Consistory, Hilary Term, 1794.

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income is about 62*l.*;" and the Court dispaupered.

In *Shaw v. Shaw* (*f*) the Court laid it down "the question is whether to admit a party a pauper? suing in formâ pauperis is a great privilege, and only belongs to real poverty; the common rule both at common law and in this Court is that after payment of debts he must not be worth 5*l.*; yet this is not to be understood if there be an income, though after the settlement of his affairs he may not be worth 5*l.* A man worth an income of 5000*l.* per annum may not after payment of his debts be worth 5*l.* The party admits that he had an income of 70*l.* per annum though he is in debt above 200*l.* beyond his effects, so that he is not in a state of extreme poverty. I shall reject his application to be admitted a pauper."

These cases are quite decisive: though in the present instance the party may be insolvent, yet by his trade his handicraft he earns nearly 70*l.* a year, he is not entitled; there is less reason also, because he is not to be a plaintiff, nor even necessarily a defendant; though there may be some doubt upon the law, whether except in some excepted cases defendants are entitled to sue in formâ pauperis; but here he is quite a volunteer, merely cited to see proceedings; he is not bound to appear, he is a mere intervener; this is not a favourable case for indulgence. There is another party, a pauper, also contesting suit and nothing to induce a suspicion that the adverse parties are colluding; indeed the inference arising from these proceedings would

(*f*) Consistory, Michaelmas Term, 1807.

be directly the reverse, and it would be great injustice and hardship if the executors were to be harassed by two paupers ; the case therefore is in no degree favourable ; there is no necessity for any appearance ; but if there were ever so great a necessity, I am satisfied that on principle and authority this person has made out no title to be admitted a pauper.

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BILLINGHURST v. VICKERS, formerly LEONARD.

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JOSEPH LEONARD died on the 6th of March, 1808; on the 21st of the same month, Ann Leonard his sister took out letters of administration to the goods and chattels of the deceased on the ground of his having died intestate. A citation was afterwards served upon Ann Leonard calling upon her to bring in the said letters of administration, and shew cause why they should not be revoked, and also why probate should not be granted of the following will to Mr. Billinghamurst the sole executor named in it.

Part of a will established, and part held not to be entitled to probate.

“ This is the last will and testament of Joseph Leonard, No. 3, Great Dean’s Court,
“ St. Martins le Grand, Tailor. First, my just
“ and lawful debts paid as soon as may be

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"after my decease, I leave Ann Leonard,
"spinster, the sum of one shilling; the re-
"sidue of my property I may possess at my
"death to be disposed of as under; to Joseph
"King, of Elgin, 500*l.* 3 per cent Bank An-
"nuities; William Thomas, the same amount,
"of Queen Street, Cheapside; to Mr. Free-
"bane, at Mr. Creight, Watling Street, the
"sum of fifty pounds Bank Stock; To Sarah
"Warner four hundred pounds three per cent
"Consols; to William Billinghamurst, of St.
"Martins le Grand, five hundred pounds,
"and to be my whole and sole executor and
"residue legatee."

"Signed this fifth day of March, 1808.

Witness

JOSEPH LEONARD.

John Obadiah Jaques,
William Marston.

Swabey and Adams (a) argued in support of the
will.

Jenner and Edwards (a) contra.

JUDGMENT.

SIR JOHN NICHOLL.

The question arises on the will of Joseph Leonard, who died on the 6th of March, 1808; he left a sister; the only person who would have been entitled to his property had he died intestate; the will is dated on the fifth of March. The allega-

(a) The substance of the pleas given in on each side, and the evidence adduced in support of them, are so amply recapitulated in the judgment pronounced by the Court, that it has not been thought necessary to insert them here.

tion propounding this paper was special ; it pleaded the disaffection of the deceased to his sister, and his dislike of her,—his repeated refusal to see her during his last illness,—and his declaration that he had cut her off with a shilling ;—that he was much addicted to the immoderate use of spirituous liquors by which he had injured his health, but that his mental faculties save when he was under the immediate influence of liquor were in no degree impaired, and that he wholly abstained from spirituous liquors with the exception of some weak rum and water during the whole of his last illness ;—that while confined to the house by his last illness he did with his own hand write so much of the will propounded as is contained between the words “ This is the last will ” and “ Bank Stock,” but that being in a weak state of body he found himself unable to complete and execute the same, and therefore sent for Mr. Billinghamurst and requested him to finish it ;—that Billinghamurst advised him to defer it till the Monday following, when he might be able to write it himself, but the deceased persisted in his request that it should be done then, and accordingly the remaining part of the will was written by Billinghamurst from instructions of the deceased, and when it was so done was read all over to and approved by him ;—but that he declared he had an intention if he lived till Monday to leave some legacies in charity, and desired Billinghamurst to turn over in his mind what public charities were the best objects ; but that for fear of accidents he would not defer the execution of his will. The allegation then states the execution in the presence of two witnesses and

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pleads that the deceased had been intimate with Billinghamurst for forty years, and that he had a great regard for Sarah Warner a legatee in the will, who had lived in his service several years and to whom he had often made proposals of marriage.

In contradiction to this it is pleaded in a single article that there were no instructions given for the will, that it was not read over to the deceased, and that he was incapable at the time of execution.

This is the substance of the pleas to the merits of the case; other pleas have been given in exception to the credit of the witnesses.

The two subscribing witnesses have been examined.

The first says that he was brought by Billinghamurst, and introduced by him to the deceased, who he says appeared as if he knew him but did not speak; that while he took the pen into his hand he fixed his eyes on the paper writing; that he appeared rational and sensible, and the witness thought he was reading the paper. This witness, from other parts of his evidence, appears a fair and cautious witness.

The second witness is a carpenter, he was fetched also by Billinghamurst, he says that the deceased looked earnestly at him, but did not speak, he appeared to read the paper but did not speak; the witness is deaf, but he saw the motion of the deceased's lips and was informed that he was asking where he was to sign.

These two witnesses, therefore, in substance give nearly the same account of the transaction.

The handwriting of the former part of the will and the signature are clearly proved by one witness, and are not ventured to be disproved by plea. This is therefore full proof of an act of execution ; and execution generally speaking implies every thing till the contrary is proved ; proof of reading over, proof of instructions are not necessary unless the capacity is shewn to be doubtful.

In the present instance there are no instructions, and the latter part of the will is written by the executor himself, who is principally benefited, and who appears to have been the active agent in bringing the witnesses to the deceased's house.

The case resolves itself into one of capacity ; unless capacity be impeached, the proof is such as will satisfy the law ; if capacity be wholly impeached, the whole instrument may be invalidated ; if capacity be partly impeached, a part of it may be invalidated.

It is alleged by the next of kin that the deceased was not capable of making his will for some time previous to his death : they certainly have produced several witnesses, who speak strongly to incapacity ; they depose that for three years he was not capable of making his will ; but, all these witnesses on the cross examination admit that he had given himself up to excessive drinking, that his derangement was occasioned by drunkenness, and upon the whole there is no reason to conclude that he laboured under any incapacity except when under the influence of excessive drinking, and that when free from the effects of liquor he lost his insanity. This however is widely different in a

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legal view from insanity ; he carried on his business himself,—he was a tailor till the time of his death,—he kept his own accounts,—he made his own returns to the assessed taxes ;—he was a drunken man and played drunken pranks,—but was not an insane man ; where this habit has continued such a person is liable to imposition and his capacity is become more doubtful and equivocal.

The apothecary and another witness state that the deceased for the last ten days was quite capable of making his will ; they also speak to his fixed determination not to leave his property to his sister.

Violent quarrels are proved between him and his sister, and a separation had taken place between them ;—both indulged in drinking to an excess ;—each frequently threatened to destroy the other's life.

The apothecary endeavoured to bring about a reconciliation which the deceased refused, he spoke of his sister in terms of the utmost dislike and said he had made his will and cut her off with a shilling.

The apothecary's account is confirmed by Dr. Lettsom, who attended him for seven days prior to the 4th of March. Dr. Lettsom forbade him the use of strong liquors except a little rum and water.

This evidence given by medical persons who speak to habitual drunkenness till his last illness, and then to his abstinence from strong liquors, coming in aid of the act of execution, obliges the Court not to pronounce against the whole of the will.

The former part of the will is supported by de-

clarations of the deceased and the evidence of the paper itself, for the whole is in his handwriting, —there is moreover the recognition of his having cut off his sister with a shilling,—and the circumstance of his pointing to the place where his will was deposited. This part therefore could not be set aside unless actual incapacity had been shewn at the time of execution.

The difficulty arises as to the remainder of the will, the appointment of Mr. Billingham as residuary legatee, and all those parts of the instrument which were in Mr. Billingham's handwriting.

The Court must take a cautious view in deciding questions of law and fact ; it is an established principle ; that where capacity is doubtful at the time of execution there must be proof of instructions or of reading over ; a man in a languid torpid state may easily acquiesce in signing his name to a will set before him, more especially when he knows that there is something in the paper which he wishes to take effect ; the presumption also is strong against an act done by the agency of the party benefited ; the act is not actually defeated as it was by the civil law (*a*) provided the intention

(*a*) Such a bequest was a complete nullity, and placed precisely upon the same footing in point of law as those bequests by which testators left property to legatees on the express condition that they in their wills should have bequeathed as much property to them.

Si quis hereditatem vel legatum adscripserit, quæritur an hæreditas vel legatum pro non scripto habeatur, et quid si substitutum habeat hujusmodi institutio ? Respondit : pars hæreditatis de qua me consultaisti, ad substitutum pertinet. Nam senatus, cum pœnas legis Corneliæ constitueret adversus eum,

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can be fairly deduced from other circumstances. Though the Court will not presume fraud, it will require strong proofs of intention. Now in this case, was the deceased's capacity so alive as to prevent him from executing an instrument of the contents of which he was not aware? or, was he so languid and reduced as to acquiesce in whatever might be proposed? His constitution and habits were broken up, he languished and died after an illness of a fortnight; the apothecary visited him on the 3d and 4th of March and the deceased died on the 6th; it does not appear directly that he saw him on the 5th, still less at what time on that day he saw him; the apothecary was not apprised that he meant to do any other testamentary act since he shewed him the will or rather pointed to it telling him that he had cut off his sister with a shilling.

What then is the fact? the deceased was gradually wearing out and actually dies within twelve hours after the transaction of the will,

qui sibi hæreditatem vel legatum scripserit, eodem modo improbatæ videtur, quo improbatæ sunt illæ, quæ ex parte, ut Titius hæredem scriptum in tabulis suis recitaverit, ex altera parte hæres esto: ut perinde haberentur, ac si insertæ testamento non fuissent. Digest: lib. 34. Tit. 8, "De eo quod quis sibi adscripsit in testamento."

The Roman law was extremely jealous on this point. It not only excluded a party from the benefit of his own act, but from the benefit also of an act done by those who might virtually be presumed to be under his influence or control; thus a legacy was as much void if it had been written by the slave or son of the legatee (provided that son had not been emancipated from the paternal authority) as if it had been written by the legatee himself. Dig. lib. 48, Tit. 10. s. 15.

The allegation given in by Mr. Billinghamurst states that he wrote the will from instructions given by the deceased and read over to him; that the deceased read over the will himself and expressed his satisfaction at it, but said that he had thought of leaving some of his property in charities, which he would do on Monday. According to the evidence, the deceased was so worn out that he could not go on to complete his will; the legacies do not go near to dispose of the bulk of his fortune, they amount to about 1200*l.*, whereas his fortune is between 4 and 5000*l.*

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Billinghamurst fetches the witnesses, two young men, neighbours, and not the persons originally intended by the deceased; the deceased did not speak; at one of the witnesses he looked earnestly; the other he seemed to know; he takes no notice though they were not the persons he expected.

Billinghamurst conducts the whole of the transaction, he reaches the pen and the deceased looks at Billinghamurst to shew him where to sign, but does not speak or take any notice; the witnesses sign their names and immediately leave the room; this is the whole of the execution;—there is no reading over,—not a word exchanged,—it is all the act of the executor;—what is there to satisfy the Court that the deceased knew the meaning of this addition to his will?—The attesting witnesses give no proof that the deceased by an acquiescing “yes” knew the import of this latter end of the paper.

The silence of the deceased and the active agency of Mr. Billinghamurst increase the demands of the law; there is no appearance affirmatively

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of fraud or imposition. The Court also does not presume fraud ; but the Court demands proof.

What are the circumstances relied upon in addition to the execution ? declarations that he would give his sister only one shilling, but nothing to shew that he intended to appoint Mr. Billinghamst executor and residuary legatee, nothing in the way of previous declaration on this point. The matter is brought up to the account given by the subscribing witnesses and there it ends. There is a complete absence of instructions and of all declarations of intention respecting Mr. Billinghamst ; there is no proof that the deceased had any knowledge of the transaction.

At the same time it is to be remembered that he had a great regard and friendship for Billinghamst, and also for the maid servant (Sarah Warner), and it is not improbable that he might have intended Billinghamst to be executor, and to have given him and Sarah Warner some legacy, but the Court cannot act upon probabilities ; it must have proof.

In the absence of all instructions from the deceased the declaration spoken to by Mrs. Warburton is very material ; an exceptive allegation has been given in to the character of this witness ; the result of it is that her character is left much where it was. Without an exceptive plea the Court would have been much on its guard for fear of misrepresentation as to a declaration of this sort ; Mrs. Warburton states that Billinghamst told her that
“ a few hours after the deceased’s death, when she
“ was conversing with him on the deceased’s mode
“ of life, and the miserable state in which he died

“ although he was worth so much money, and re-
 “ specting his being a man of large property ; the
 “ said Mr. Billinghamurst then said, speaking of Jo-
 “ seph Leonard, *He sent for me last night, and*
 “ *he then made something of a will, and he was*
 “ *so very ignorant that he had no idea but that the*
 “ *girl (meaning the deceased's said servant Sarah*
 “ *Warner,) and I might sign his will, and that*
 “ *that would be sufficient ;* or the said Mr. Bil-
 “ linghamurst made use of words to that effect, mean-
 “ ing that the deceased thought them, the said
 “ William Billinghamurst and Sarah Warner, com-
 “ petent to become subscribed witnesses to the said
 “ will ; and the deponent observed that, as they were
 “ not proper persons to sign such will, she sup-
 “ posed the deceased had left them legacies ; and
 “ Mr. Billinghamurst then replied that he (meaning
 “ the deceased) had done so, and that he had left
 “ him 500*l.* and had pressed him many times over
 “ to know if that would satisfy him, and if it
 “ did not he should have more, and that the an-
 “ swer he had given was that he was thoroughly
 “ satisfied ; and he then added that out of the sum
 “ of 500*l.* he was to bury the deceased and collect
 “ in his book debts and settle his affairs, and that
 “ he hoped Miss Leonard would make no disturb-
 “ ance about it, but would pay all the legacies, for
 “ there would still be sufficient for her as the de-
 “ ceased had willed not so much as 1500*l.* sterling
 “ as all the legacies consisted of stock except his
 “ own which was 500*l.* sterling ; and he, the said
 “ William Billinghamurst, said at the same time that
 “ the deceased was tired that night and could not

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"think of any thing more he wished to do, and
"had desired him to come on the Monday follow-
"ing to finish the will as he thought of leaving
"some legacies to charities."

It is singular if the deceased did not think he had finished his will that he should interpose an executor and residuary legatee; it has been argued that the declarations of the deceased might have the effect of supplying the two legacies; the Court feels a strong inclination to pronounce for them, but it has considerable hesitation in this respect, being unwilling to depart from its usual rules. I shall take time to consider as to the point of these two legacies; recommending to the parties to consider (particularly as the sister if the deceased had lived would certainly have been cut off with a shilling,) whether they shall not pay them.

I have no hesitation in pronouncing that the party has failed in proof of that part of the will which is applicable to the appointment of the executor and residuary legatee.

I pronounce therefore against the last clause of the will; but in favour of the first part of it; and I reserve the consideration of the two legacies.

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JUDGMENT on the reserved question.

SIR JOHN NICHOLL.

The opinion of the Court has already been given on the principal part of this case. It has been stated that the first part of this will which was alleged to be in the handwriting of the deceased is sufficiently proved ; but that there is a failure of proof as to the appointment of the executor and the disposition of the residue.

The Court took time to deliberate respecting the proof of two legacies, viz. 400*l.* 3 per cents to a maid servant, and 500*l.* to the executor Mr. Billinghamst.

Considering that the capacity of the deceased was extremely doubtful at the time of execution ; that there is a total absence of proof of any instructions for these legacies, or any thing which could be considered as a substitute for instructions ; that these legacies are in the handwriting of one of the legatees ; that the whole transaction was conducted by the two interested parties ; it would be extremely dangerous to accept declarations however probable and circumstantial made by those very persons after the deceased's death as any and the only evidence to supply the want of instructions, being wholly unsupported by any sort whatever of testamentary declarations, or of recogni-

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tions made by the deceased himself. The safer course is to adhere to the rule ; that, when the capacity is doubtful at the time of execution, and there is no evidence of instructions, especially where the act is done through the agency of the party interested, the proof of mere execution is insufficient.

I pronounce therefore for that part of the will which is in the deceased's handwriting, and that the executor has failed in proof of the rest.

END OF PART I. VOL. I.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Doctors Commons ;

AND IN THE

HIGH COURT OF DELEGATES.

THE (a) PECULIARS' COURT OF CANTERBURY.

AUGHTIE v. AUGHTIE,

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JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for nullity of marriage, by reason of affinity. It is brought by Charlotte Aughtie

Marriage
annulled by
reason of affi-
nity.

(a) A Peculiar, in the ecclesiastical acceptation of the term, is a district exempt from the jurisdiction of the ordinary of the diocese. The Peculiars of the archbishops had their origin from the privileged jurisdiction which they exercised in those places where the archiepiscopal palaces and possessions were situated. Within the province of Canterbury there are more than an hundred Peculiars: but the term *parochia* is applied to thirteen parishes within the City of London, and the several parishes composing the deaneries of Croydon in Surrey, and

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against William Aughtie, to declare a marriage solemnized between them to be void, on the ground of his being the brother of her former husband.

There can be no doubt, if this is the case, that such a marriage is prohibited by law, and voidable. The facts necessary to be proved, are the two marriages, and that the two husbands were brothers.

Three witnesses have been examined, who very satisfactorily prove the case; Gabriel Waterer states, that he was the uncle of the two husbands, being half brother to William Aughtie, their common father: Rose Bottom was aunt to the woman, and was present at both the marriages: and, thirdly, Archibald Campbell Russell was well acquainted with all the parties, the woman and both the husbands.

It appears that Gabriel Aughtie married Charlotte Scott, on the 27th of February, 1791; ten children were the issue of this marriage, of whom eight are alive; the husband died in December, 1806. On the 27th of February, 1808, the widow married William Aughtie; the subsequent cohabitation of these parties, and the birth of a child are proved; the legality of the latter marriage was canvassed before it took place, and strong remonstrances were used with both parties to prevent it.

Shoreham in Kent, of these the Dean of the Arches is Judge. In the other Peculiars, the jurisdiction is exercised by commissaries; from whose sentence an appeal lies to the Court of Arches.

Under these circumstances, there is clear and satisfactory evidence of the facts necessary to be proved, and I pronounce for the nullity.

A question being raised as to costs.

Per Curiam.

The parties are very much *pari delicto*: The marriage being void, *ab initio*, the husband has acquired no right over the property of wife. Mr. Russell told her the marriage was illegal, and endeavoured to dissuade her from it, without effect; both parties too are involved in the incest. I shall give no costs.

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AUGHTIE
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ARCHES COURT OF CANTERBURY.

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BALFOUR v. CARPENTER, falsely calling herself
BALFOUR.

An Appeal from the Consistory Court of Exeter.

The article of an allegation admitted, which pleaded that a licence granted by the bishop of Winchester's commissary for Surry, would not be valid for a marriage contracted within the diocese of Winchester, but without the jurisdiction of the commissary for Surry.

CAPTAIN William Balfour, of the 40th regiment of foot, stationed at Portsmouth, contracted a marriage at that place with Rebecca Carpenter, on the 11th of March, 1803, in virtue of a licence, granted by the Bishop of Winchester's Commissary for Surry.

On the 15th of February, 1810, Captain Balfour instituted proceedings in the Consistory Court of Exeter to annul this marriage. The libel alleged the minority of the husband at the time the licence was granted; and that the marriage was solemnized without the consent or knowledge of his father; and so far it was not opposed: but a question arose as to the admissibility of the fourth article, which pleaded as follows:—"That the marriage was solemnized by virtue of a pretended licence, granted unduly under seal of the Court of the Commissary of the Lord Bishop of Winchester, in and for the parts of Surry, by the reverend Thomas Russell, Clerk, a Surrogate of the said commissary, for the solemnization

" of the said marriage, in the parish church of
 " Portsmouth, in the county of Southampton ;
 " and that the said William Balfour, in the affi-
 " davit by him made, in order to lead the same,
 " was described of Portsmouth, in the county of
 " Southampton and diocese of Winchester, a bat-
 " chelor, of the age of twenty-one years and
 " upwards ; and the said Rebecca Carpenter, of
 " the town of Southampton, in the same county
 " and diocese, a spinster, of the age of twenty-
 " one years and upwards ; notwithstanding neither
 " of the said places, or the said parish church of
 " Portsmouth, is within the parts of Surry, which
 " are within the said diocese of Winchester, or
 " jurisdiction of the said Commissary ; and that
 " the said Thomas Russell in fact had no au-
 " thority to grant licence of marriage between the
 " said parties, or for the solemnization thereof in
 " the said church."

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 v.
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[*The Court at Exeter rejected this article : from which sentence this appeal was interposed to the Court of Arches.*]

Arnold and Swabey for Mr. Balfour.

The authority of a surrogate can be no other than that which is delegated to him by his principal. The commissary of Surry only holds such part of the office of the bishop of Winchester as applies to a part of his jurisdiction ; being restrained within certain limits, it is not co-extensive with the Bishop's jurisdiction ; without these limits, therefore, it cannot be competent to him to grant a licence ; and all marriages are void if the licence is not granted by competent authority. Could it be

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maintained that a probate or letters of administration would be valid at Portsmouth which had been granted by the commissary of Surry? And yet the cases are strictly analogous.

JUDGMENT.

SIR JOHN NICHOLL.

This is a case of nullity of marriage; the citation is general, and does not confine itself to the minority of the party.

The fourth article of the libel pleads the marriage to have taken place in March 1803, in consequence of a licence unduly granted by the commissary of Surry.

The question for present consideration is, whether the judge of the court below did right in rejecting that part of the article which states that the licence had been unduly obtained.

The licence, in form, runs in the name of the bishop of Winchester, within whose diocese the marriage was celebrated; but it has been argued, that it is signed by the registrar of the Commissary Court, whose jurisdiction is confined to the county of Surry.

This is a new case, and the Court would not unnecessarily decide any new case which shakes the validity of any one marriage: I am disposed, therefore, to allow this article to remain part of the libel; but as there is another ground of objection to the marriage on the score of minority, it may be totally unnecessary to decide this question.

The case is not quite clear from doubt, even if it should be decidedly an invalid licence: on the face of the act there would be a question whether

a marriage would be void, solemnized without fraud under a licence given by a person not having authority to grant the same.

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Another question would be, whether this licence granted in the name of the bishop of Winchester, is to be considered as the licence of the bishop of Winchester, or of the commissary of Surry.

If it is the licence of the commissary of Surry, he could have no authority to grant a licence for persons resident at Portsmouth; if it is the licence of the bishop, it would be the licence of a person fully competent to grant it. Which may be the correct interpretation of the act, the Court will not prejudge in the present state of the question.

I shall allow the article to stand as a part of the libel. If the nullity is not proved on the one point, the party shall have the benefit of trying the validity of the marriage on the other.

The Court gives no opinion that a marriage of this description is to be considered an invalid marriage.

*The sentence of the Court below was reversed,
and the fourth article of the libel admitted.*

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LOVEDEN v. LOVEDEN.

(An Appeal from the Consistory Court of London.)

Alimony
given from the
date of the
sentence and
the appeal.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit brought originally in the Consistory Court of London, by the husband against the wife, for a separation by reason of adultery.

In that suit 800*l.* per annum was allotted to the wife as alimony. A sentence of separation was pronounced on the fourth session of Trinity Term, 1810. An appeal was immediately declared; and was prosecuted by praying the inhibition on the following court-day, which was returned on the first session of Michaelmas Term.

An application is now made to this Court for alimony. The amount of the sum given in the Court below is not objected to; the only question is, from what time the payment is to commence; whether from the day of the sentence and the appeal, or from the day of the return of the inhibition.

On principle I think it is due from the day of the appeal. The appeal suspends the sentence, but the suit still continues; and if it is no operative sentence the husband is obliged to maintain his wife till the suit is terminated. In reason I think

it should be due from the date of the sentence, otherwise there might be an interval, during which the wife would have no maintenance or support; and this should not be, unless she has waived her right, or forfeited it by some misconduct.

According to practice in the first instance, it is usually allotted from the return of the citation; yet this is not absolutely binding, for Clarke lays it down that it shall be allotted either from the date, or from the return of the citation. "Tunc (a) "*judex taxabit sumptus alimonie juxta ejus arbitrium in hunc modum, taxamus sumptus alimonie pro quolibet hebdomada à tempore datæ, vel re-latæ citationis primariæ, (si hoc sibi æquum visum fuerit) ad talem summam solvendam durante lite.*"

But this leaves it in the discretion of the Court; and very properly. If diligence is used in the return of the citation, it may be sufficient to allot from that time, and which is now the general practice; for till then she may be considered as able to obtain subsistence on the credit of the husband.

But suppose the husband to take out and serve the citation, and that, to answer his own purposes, he delay the return of it; in such a case the wife may be justly entitled from the date of it. This also is provided against by Clarke:—"Caveat (b) "*tamen judex, ne circumveniat in taxatione prædictâ, videlicet à die datæ citationis: nam aliquando agentes curant citationes extrahi, et tamen eas exequi, et certificari differunt, per annum, aut cir-*

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(a) Oughton, Tit. 206, c. 6. Clarke's Praxis, Tit. 35.

(b) Oughton, 206. c. 8. Clarke's Praxis, Tit. 36.

1810. "citer: quâ fraude per judicem compertâ taxare
Michaelmas "solet expensas, et allocare sumptus alimonie à
Term. "die executionis, sive relationis citationis."

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I am not aware that Clarke lays down any different rule as to when it is to commence in case of an appeal; but I apprehend that the same considerations would apply in this as in the other case. It must be in the discretion of the Court, and depending upon the conduct of the party. If due diligence is used from the date of the sentence, the alimony as well as the suit must be considered as continuing; and this is warranted by the practice, for I find that it is usually so paid: and I find no authority in the books for a different course of proceeding.

Cases have been mentioned in which alimony has been given from the return of the inhibition; others have been alluded to, in which it has been continued; and I have no doubt but that the difference has arisen from unnecessary delay in the conduct of the proceedings.

In *Gresse v. Gresse*, (*d*) on an appeal from the Consistory, 200*l.* had been given in the Court below: An act on petition was entered into in the Arches Court, in which it was stated on the one side, that arrears were due from the alimony given in the Court below; and on the other, that the wife had delayed the proceedings; and that alimony was only due from the date of the inhibition.

(*d*) This was a case decided in the Arches Court, but I have not been able to ascertain the exact date of it; I find it cited as an adjudged case in *Michaelmas Term*, 1780.

In that case the Court gave only from the return of the inhibition.

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But this decree appears to have been founded on the delay which was alleged against the wife ; and if that case resembled the present, I should think that decision sufficient authority to allow alimony only from the return of the inhibition.

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Here, however, nothing wears the slightest appearance of delay ; on the contrary, every possible diligence has been used. The suit was determined on the fourth session of Trinity Term, in the Consistory ; the appeal was prosecuted instanter, for an inhibition was prayed in the Arches on the very next court day, and on the first session of Michaelmas Term the inhibition was returned. Now, because it happened that the sentence was so late in Trinity Term that the inhibition could not be returned till Michaelmas Term, is the wife to be without any means of subsistence for three months ? This would be manifestly unjust.

I think, therefore, that alimony is due from the date of the appeal and the sentence, which were on the same day ; it being understood that in a case of delay the Court would feel itself warranted in decreeing it only from the return of the inhibition.

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January 30.

PANCHARD v. WEGER.

An executor, for whom an appearance had been given, dismissed. And a party having admitted an interest, held not to be at liberty to retract it.

ISABELLA Swainston widow, by her will, dated January 6, 1810, gave her niece, Harriet Weger, 20*l.*, in consequence of ill behaviour, and gave all her other effects to her executors, in trust for John Lewis Panchard and Louisa Rosalette, otherwise Rosalie St. Claire, and to her niece, that should be living at her decease, (save and except the said Harriet Mary Weger,) share and share alike, with benefit of survivorship; and her linen and wearing apparel to be at the discretion of her executors; and appointed John Louis Panchard, Richard Reece, M. D., and John Baker, executors.

By a codicil, bearing date 31st January, 1810, she appointed Major John Johnson an executor.

A caveat was entered against these testamentary instruments, which was warned in the name of all the executors. Mr. George Jenner then appeared as proctor for the executors, and prayed probate. Mr. Townsend appeared as proctor for Harriet Mary Weger, and alleged her to be the niece and the next kin of the deceased, and prayed an answer to her interest. The proctor for the executors admitted Harriet Mary Weger's interest; but in the following term he retracted this admission, and denied the same; he declared also that he proceeded no further for John Louis Panchard.

Townsend prayed to be heard on petition. An act in petition was accordingly entered into by both proctors.

By this petition Jenner prayed, that Mr. Panchard might be dismissed from the suit, and that Townsend might be assigned to declare whether he would propound the interest of his client ; and Townsend, on the other hand, contended, that the interest of his client having been once admitted, he could not be put on proof of it ; and that an appearance having been given for Mr. Panchard, he could not be dismissed before the termination of the suit.

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v.
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JUDGMENT.

SIR JOHN NICHOLL.

On this petition, amongst several others, two principal points are made :—

First, whether a proctor, having given an appearance for several executors, and now declaring that he proceeds no further on the part of one of them, is entitled to obtain the dismissal of that executor ?

Secondly, whether a proctor, who has appeared for the executors, having admitted the interest of the party opposing the will, can now retract that admission, and put the party to proof of his interest ?

Mr. Panchard, the executor, for whose dismissal the application is made, was in the East Indies at the time of the deceased's death, and is there now ; the appearance, therefore, was given without authority from him ; no proxy has been exhibited for him ; it is not unusual for the Court to dismiss an executor who has not intermeddled with the effects, or gone to such a length in a cause as to render himself liable to costs. I think in

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 v.
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this case, the fact of his absence in the East Indies is a sufficient justification to the Court for dismissing him; his being party to the suit might occasion delay and inconvenience in the administration of justice; he might be called upon for answers. Considering this, and that he has never given any authority for his appearance, I shall dismiss him.

As to the *second* point, it appears that from two of the executors an appointment had been made of a proctor before the interest of the adverse party was admitted; the third executor afterwards appoints the same proctor.

I apprehend, from the practice of the Court, a proctor will not admit an interest without authority. I must assume therefore the fact not being denied, that the admission has been made with the privity of all the executors; then the question is, whether they shall now be permitted to retract that admission? In all cases it is the more convenient practice to admit the interest of a party; it saves great expense and delay; by it the party is admitted a contradictor; no ground is asserted for retracting the admission here; no third party can be injured by it; the executors must prove their will; and their admission does not bind any of the next of kin. It has been thrown out in argument on the part of the executors, that if the Court should permit this admission to be retracted, the party opposing the will must go on and prove her interest before she can be admitted to oppose the will; I have always understood the practice to be, that the parties must go on *pari passu*.

In *Burrows v. Belch*, (e) the interest was denied and propounded; the will also was propounded; but before a witness was examined, the party whose interest was denied, gave an allegation opposing the will. It was objected by Dr. Harris, that he had no right to give an allegation in opposition to the will till he had proved his interest; but the Court said, that in cases of this description the parties were to proceed together, and over-ruled the objection, and I have always understood the rule to be so; it was so held also in *Waller and Smith v. Heseltine*, and *v. Burgh*. (f).

I should have been of opinion therefore, if the executors had been at liberty to retract their admission, that still the parties must have gone on together; but I shall not permit the interest which has been admitted by the executors to be now denied; as it gives the party no other benefit, than the right of opposing the will.

(e) Prerog. Hilary Term, 1793

(f) See p. 170.

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PANCHARD
v.
WIGER.

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Hilary
Term,
Feb. 15.

PASSMORE v. PASSMORE.

An extract
from a letter
propounded as
a codicil, re-
jected.

HENRY Passmore, of Exmouth, in the county of Devon, died in the autumn of 1810.

An allegation was given, in propounding a will, dated the 26th of March, 1793, and a codicil, dated the 20th of August, 1798. The will was a formal instrument, regularly executed and attested; but the codicil was part of a letter, written by the deceased, when he was on board a ship, at the Motherbank, and bound on a voyage to the East Indies, to his brother, who was also his attorney; the letter was of very considerable length: the extract propounded occurred in the middle of it, and was as follows:—

“ As to your daughters all, they give me
“ pleasure, to see their very great attach-
“ ment to their parents. Do not mean,
“ however, to exclude Abraham in that par-
“ ticular; he, I know, has a good heart.
“ Also, with regard to Udrey, he, poor fellow,
“ I believe, is not mentioned in my will hi-
“ therto, though think he was born at the
“ time it was made; how he slipt my me-
“ mory I know not; my design was not to
“ do so. I do now empower you, as my at-
“ torney, to make him equal with my other
“ nephews. As to Henry, he is heir to his
“ father’s part, and, I suppose, grand-
“ father; if so, he will be best off; indeed I

"wish it so, for his father's sake Oh, how
"do I bewail the loss of that young man."

An extract from a memorandum-book, in the
hand-writing of the deceased, was also exhibited to
the Court, viz.

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| | | | |
|--------------------------|---|---|------|
| " Brother Abraham, | " | - | £500 |
| " Brother George, | " | - | 500 |
| " Sister Jane, | - | - | 750 |
| " Jane Mitchell, | - | - | 500 |
| " Christiana Brooks, | - | - | 500 |
| " Maria Engels, | - | - | 400 |
| " Abraham Passmore, jun. | " | - | 450 |
| " Udney Passmore, | - | " | 400 |
| " Richard Passmore, | " | - | 250 |
| " Mrs. Abraham Passmore, | " | - | 100 |
| " R. Brook, | - | - | 100 |

£4,350

"The above I mean to bequeath to the
"names opposite the sums.

"October 12, 1804.

"HENRY PASSMORE."

Adams against the codicil.

Stoddart in support of it.

JUDGMENT.

SIR JOHN NICHOLL.

The question arises respecting a paper pro-
pounded as a codicil to the will of Henry Pass-
more.

The allegation pleads the fact of a will in 1793,—
several bequests that it contained,—the death of
several parties benefited under it,—and that it was

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formally drawn and regularly executed, and attested by two witnesses.

The third article propounds the paper on which the question arises, and states, that the deceased intending to dispose of the lapsed shares in the will, and to provide for a nephew and great nephew, wrote, when on board a ship at the Motherbank about to sail for the East Indies, a letter, which it is contended may operate as a codicillary disposition.

That the instrument is in the form of a letter is not a conclusive objection against it ;—various instruments not exactly in the form of a will,—letters,—deeds of gift,—marriage settlements,—have been held to be testamentary, if the Court has been satisfied as to the intention of the testator. It has been sufficient if they have contained directions how property should be disposed of in the event of death ; nor has it been held necessary that they should be in direct and imperative terms ; wishes and requests have been deemed sufficient.

The Court must judge from the form of the paper, —from its nature,—contents,—and appearance,—whether it was written and intended as a formal permanent will, which it must be presumed the deceased meant should operate unless some act was done to revoke it ; or whether it was a deliberative and temporary paper, which expressed the impression and wishes of the moment, and was never afterwards thought of, or adverted to. In the latter case, it can only be established by the aid of extrinsic circumstances. This principle, I apprehend, was recognized, restored, and re-esta-

blished by the Court of Review in the case of *Matthews v. Warner* (a).

The paper, in the present instance, is a very long letter, written by the deceased to his brother, who was also his attorney, just previous to his setting sail on an East India voyage: the letter embraces all sorts of subjects, some important and some trifling; it is written with erasures and alterations; in the midst of it the passage which has been propounded occurs.

What would have been the effect of this letter if the deceased had died during the voyage, and while his brother continued to act as his attorney, would have been a different question; but I cannot suppose he intended this as a permanent testamentary act, nor perhaps as any testamentary act at all; though, if he had died on the very voyage, it might have been established as deeds of gift and instruments sometimes are, in order to prevent intentions from being defeated. But the deceased returned from this voyage; he lived a great many years afterwards; and it is not pleaded that he ever made the least reference to this letter; nor is there the suggestion of any recognition of it: but something of a contrary inference is to be deduced from a book which has been produced, containing a memorandum of persons to whom he intended to bequeath his property; this memorandum is dated October, 1804. The disposition is on a different plan; specific sums are given to each person, instead of dividing the property into parts; he had made a former

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(a) *Vesey Jun.* Vol. IV. p. 186.

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will, in a regular and formal manner; he intended to make a future will after the same manner.

Upon the whole view of the circumstances, I am satisfied that the deceased never intended this letter to operate as a permanent disposition of his property; there is nothing to repel the presumption against it of an incomplete and imperfect paper; and I shall, therefore, reject the allegation.

ARCHES COURT OF CANTERBURY.

1811.

*Hilary**Term,**Feb. 20.*

BALFOUR v. CARPENTER, falsely calling herself
BALFOUR.

An Appeal from the Consistory Court of Exeter.

JUDGMENT.

SIR JOHN NICHOLL.

A marriage
annulled by
reason of the
minority of
the husband,
and the want
of his father's
consent.

The Court must recollect that the law is to be administered upon the facts that come before it: it is true that the party bringing this suit is entitled to no indulgence; but he is entitled to the law. If the facts in this case are not sufficient to establish the case, the act of parliament must be considered as annulled. The counsel had been driven to offer arguments perfectly desperate in their nature.

The party was born on the 17th of July, 1783; this is proved by his father.—The marriage was in March 1803, under a licence, proved by the clergyman, the clerk, and the entry.

If this is the marriage of the man born in 1783, there can be no doubt but that he was a minor; and no doubt is suggested as to the identity of Mr. Balfour.

The act of parliament declares the marriage of a minor null and void without the previous consent of the father. The cases cited go no further than

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BALFOUR

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to shew that, from circumstances subsequent to the marriage, there has been ground to presume the father's consent. The Court presumes consent, unless dissent is proved.

Here there is proof of the ignorance of the father, and I think of his dissent, for it appears that he was totally ignorant of this marriage, till two years after it was solemnized. The Court will go a great length in presuming consent, but here is proof that there was no previous consent.

It has been stated in argument, that on the son's coming of age, the father took no steps to dissolve the marriage. But how could he? the son being of age, the father was not competent to prosecute the suit. No court of justice would be warranted in distorting the law to the extent contended for in this case:—it is proved that the father was so incensed at the marriage that he would not see his son for four years afterwards.

Another ground has been taken, which is rather an extraordinary one, that the Mrs. Balfour before the Court is not the person who was married. What reason is there to apprehend that she was a fictitious person? She has admitted herself to be the wife,—has confessed the marriage,—and given her proctor a proxy to appear for her.

This marriage is null and void to all intents and purposes in law whatsoever; if it is not declared so now, persons may appear hereafter, and contest it.

These cases are unfortunate, and unfavourable to the man, who, having himself procured the licence, now moves the Court to pronounce for a nullity.

The marriage, however, was had while the man was a minor, without the consent of his parents; and I have no hesitation in pronouncing the libel to be proved. In so doing, I do not differ from the case of *Osborne v. Goldham* (a), or from that of *Selby* (b). In those cases there was no direct proof of the want of consent.

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On the other point in the case, it is not necessary to decide; and I give no opinion as to the validity of a marriage under such a licence.

—◆—
The marriage was annulled.
—◆—

(a) *Osbourne v. Goldham*, Consistory Court of London, Aug. 2, 1808, Arches Court of Canterbury, Dec. 12, 1808.

(b) *Selby v. Selby*, Consistory Court of London, 1771.

Delegates,
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HIGH COURT OF DELEGATES.

COPE v. BURT, falsely calling herself COPE.

An Appeal from the Arches Court of Canterbury.

May 8. The Judges' delegates who sate under this Commission were

Mr. Justice LAWRENCE,
Mr. Baron GRAHAM,
Mr. Justice BAYLEY,
Doctor ADAMS,
Doctor LUSHINGTON,
and
Doctor DODSON.

A marriage under a licence, in which one of the parties was described by a false Christian and surname, held to be valid.

THE question in this case arose upon the admissibility of an allegation which had been successively rejected by the Consistory Court of London, and the Arches Court of Canterbury.

The allegation was offered on the part of John Cope, Esq.; and the purport of it was to set forth such a statement of facts as might induce the Court to annul a marriage which he had contracted on the 2d of February, 1793.

The marriage had been solemnized under the sanction of a licence which authorized the mar-

riage of John Cope with Elizabeth Melville, widow. This licence had been obtained on the affidavit (a) of Mr. Cope; the case now set up by him was, that the person he had married was not, in point of fact, Elizabeth Melville a widow, but Sarah Burt a spinster.

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The third, fourth, and fifth articles of the allegation pleaded to the following effect :

3. " That Sarah Burt, falsely calling herself Cope, from the time of her birth lived with Edward Burt and Hannah Burt, her father and mother, in the parish of Whitechapel, until the death of her mother, which happened when she, the said Sarah Burt, was about three or four years of age ; that after that event the said Edward Burt, her father, removed from thence, and went to reside in Queen Ann-street, Middlesex Hospital, in the parish of St. Mary-le-bone, in the county of Middlesex, and took with him the said Sarah Burt ; and she, the said Sarah Burt, continued to reside with her said

(a) The following is a copy of the affidavit :—

" Vicar General's Office, " January 31, 1793.

" Which day appeared personally John Cope, and made oath, " that he is of the parish of St. James, Westminster, in the " county of Middlesex, a bachelor, of the age of twenty-one " years and upwards, and intendeth to intermarry with Elizabeth " Melville, of the same parish, a widow, and that he knoweth " of no lawful impediment, by reason of any pre-contract, con- " sanguinity, affinity, or any other lawful cause whatsoever, to " hinder the said intended marriage, and prayed a licence to " solemnize the same in the parish church of St. James, West- " minster : and further made oath, that the usual place of " abode of him the appearer hath been in the said parish of St. " James, Westminster, for upwards of four weeks last past .

" JOHN COPE."

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father there until about the year 1781, when she quitted his house; and that during all the time she, the said Sarah Burt, so lived and resided with her said father, in the parish of Whitechapel, and in Queen Ann-street, she constantly, and invariably, passed and was known by the names of Sarah Burt, and by no other."

4. "That the said Sarah Burt, soon after she so quitted her father's house, went to live and reside with her sister, Mary Moneypenny, wife of James Moneypenny, Esq. in Southampton-buildings, Chancery-lane, in Pump-court, in the Temple, and afterwards in Henrietta-street, Covent Garden; and continued, principally, to live with her sister there, and at other places, until about the year 1788, when she quitted her sister's house; and the said Sarah Burt did, upon her going to reside with her sister, assume, without any legal authority whatever, the surname of Melville, and drop her true surname of Burt; and during the time she so resided with her said sister used and passed by the surname of Melville, but continued to use and pass by her true Christian name of Sarah, until about the year 1787, when she dropped her said Christian name, and assumed the Christian name of Elizabeth; and from that time used and passed by the assumed names of Elizabeth Melville, until her pretended marriage with the said John Cope, Esq."

5. "That after the said Sarah Burt had quitted her sister's house, in the year 1788, she resided in lodgings in King's-street, Covent Garden, in lodgings, at the house of ——— Battersley, in the Strand, in lodgings, at the house of ——— in Charing

Cross, in lodgings, at the house of ——— in Warwick-street, and afterwards in a house in St. Alban's-street, in the parish of St. James, Westminster; and at those places respectively she pretended to be a widow, and used and passed by the assumed names of Elizabeth Melville; and the party proponent doth further allege and propound, that during such her residence at the house of the said ——— Battersley, to wit, in the year 1791, the said John Cope, Esq. party in this cause, was introduced to her under the assumed names and character of Elizabeth Melville widow, and as such paid his addresses or courtship to her, in the way of marriage, and that she, the said Sarah Burt, fraudulently concealing from the said John Cope her real names and character, and representing herself to be Elizabeth Melville, a widow, did receive his addresses and courtship, and consent to be married to him, and that accordingly, on or about the 2d day of February, in the year of our Lord 1793, a pretended marriage was in fact had and solemnized in the parish church of St. James, Westminster, by the Rev. John Waring, clerk, officiating minister of the said parish, between the said John Cope and Sarah Burt, then a spinster, and by the names of John Cope and Elizabeth Melville, by virtue of a pretended licence obtained under seal of the Vicar General of the Archiepiscopal See of Canterbury, in the said names of John Cope, bachelor, and Elizabeth Melville, widow, whereby the said pretended marriage was, and is absolutely null and void, to all intents and purposes in law whatever."

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Dr. Jenner, Dr. Edwards, and Mr. Martin, for Mr. Cope.

The parties were both of age at the time of the marriage; they were both capable of contracting and willing so to do:—under the general law, such a marriage would be good; the necessity, therefore, is thrown upon the adverse party of setting up some special law by which it can be set aside.

It cannot be said to fall under any of (a) the provisions of the marriage act, because by that act no formality is required in obtaining the licence; the grounds set up for annulling this marriage are, that the woman for fraudulent purposes assumed other names than those which properly belonged to her: on this ground, only one cause has been brought forward since the passing of the marriage act, that of *Cockburn v. Garnault*, which was a suit first brought in the Commissary Court of Surry. The licence had been obtained by the man, and there was a variation both in his Christian and surname. The decision was in favour of the marriage; the cause was appealed to the Court of Arches (b), where the sentence of the Commissary Court of Surry was affirmed; there has been no cause prior or subsequent to this, on this point, whereas many suits have been brought for nullity of marriage where the banns have been published under false names. In *White v. Paul*, an attempt was made

(a) 26 Geo. II. c. 33.

(b) *Cockburn v. Garnault*, Commissary Court of Surry, May 4, 1792; Arches Court of Canterbury, Dec. 11, 1793.

to set aside a marriage on the ground that the person, who had made the affidavit on which the licence was granted, was not the person married under it; but this attempt failed.

Marriage is a contract; and to make it valid and binding it is enough, according to the doctrine of the civil law, if the parties are sufficiently designated, *nihil valet error nominis si de corpore constat*. No fraud was intended against the ordinary; the woman had passed many years by this name prior to her marriage; and it cannot be competent to the party himself, who obtained the licence for her under that name, to come forward now after the lapse of so many years, and take objection to his own act.

Mr. Serjeant Lens, contrd.

This is an important cause as connected with great public interests, and the general interests of the community; it appears to us that there is a radical defect in the licence by which these parties were married, which no length of time can cure; it is a question of public policy and general reasoning, inasmuch as the institution of marriage is for the sake of the public as much as for the sake of individuals. No uniform current of authorities has been cited against us from the Ecclesiastical Courts: one solitary case has been produced which never reached the Superior Court.

The question then is, whether the true name of the parties is not of the very essence of such a contract as that of marriage? Whether the Christian name is not the essential name of the parties?

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This is the doctrine held by Coke Lyttelton: a man may change his surname for valid purposes; but his Christian name can only be changed at confirmation.

The marriage act is framed in the same spirit, and undoubtedly implies that parties are to be married by their true names: besides search is peculiarly eluded by this double change of names; it is calculated to avoid a law framed for the very purpose of preventing such a fraud; it is the worst kind of fraud, in *fraudem legis*, *Evans v. King*, Wills Reports, p. 554. It is not the case here as in a common contract,—the public is a third party which is interested in seeing and knowing who the parties are, who are really married; the public is imposed upon;—the name is of the very essence of the transaction;—the defect is radical;—anterior to the marriage act, it must have been always the general policy of the law, that the parties should be properly designated;—it is not the mere identity,—but the true description of the persons which is necessary.

Dr. Arnold and Dr. Swabey, on the same side.

All marriages must be by banns or by licence; banns are the more ancient mode; they are a public notice to all persons interested, to come forward and state their objections, if they have any, to the ceremony which is about to take place; it is the intendment of the act that banns should be published under the true names; and it has been held that a publication, otherwise than by the true name, renders a marriage null and void. No question

respecting false names under banns arose before the case of *Early v. Stephens* (a).

The publication of banns, however, may be dispensed with by persons having Ecclesiastical jurisdiction; but it is required that this should only be done on good caution and security being taken. This care in the grant of a licence is devolved on the ordinary; it is as necessary, therefore, that the true names should be given in a licence as in a public proclamation, otherwise the ordinary has no means of knowing, either by personal knowledge or by inquiry, that the oath of the party procuring the licence is in unison with the fact; the true name is necessary for this; the registration then follows to give facility and possibility of search into the condition of the parties to those whose interests may be involved in the marriage.

It never can be said that a grant to empower A. to marry will empower B. to do so; the very form of the instrument is for the purpose of preventing that fraud which is both suppressed and suggested in this licence.

The case of *Cockburn v. Garnault* is a single case, and the first of its kind, and it never was carried to the court of last resort.

The sentence of the Consistory Court of London was affirmed.

(a) *Early v. Stephens*, Consistory Court of London, 1785.

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Easter
Term.

COPE
v.
BURT.

1811.
Easter
Term.
May 13.

ARCHES COURT OF CANTERBURY.

TATTERSALL v. KNIGHT.

An Appeal from the Consistory Court of Gloucester.

A faculty for the erection of a gallery in a church granted, notwithstanding the opposition of the Vicar.

JUDGMENT.

Sir JOHN NICHOLL.

This is an appeal from the Consistory Court of Gloucester; where it was originally a suit to obtain a faculty for erecting a gallery in the church of Wotton-under-Edge, and for appropriating the seats in that gallery.

The application was made by several of the parishioners; the opposition was from the Rev. W. Tattersall, the vicar. The cause was heard on the 18th of June, 1810, when sentence was pronounced decreeing the faculty.

From that sentence the present appeal was made; and I have now to decide whether the Chancellor of Gloucester did right in decreeing this faculty.

The history of the case is this:—at the visitation in Michaelmas 1806, the vicar of Wotton-under-Edge made a presentment to the Chancellor of Gloucester stating, that new pews were wanting in the church, and that he and the Churchwardens had formed a plan for regulating the seats; but

that the vestry had negatived this plan: he also presented "that a gallery which had been erected "for the use of the Sunday school had been pulled "down, which he desired might be re-erected:" and he concluded by stating, "that if the leading "parishioners who wanted seats would bring forward any plan equally commodious, and which "would not be likely to disfigure the church, he "would readily concur with them."

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*Easter
Term.*

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v.
KNIGHT.

This presentment is not formally before the Court; but in the proceedings in the country Courts, (which are frequently very irregular,) it is necessary to look to the substance of the proceedings rather than to the form of them, otherwise it would in most instances be impossible to administer justice between the parties.

By the admission made in this presentment of Mr. Tattersall's, an additional accommodation in the church was necessary; the plan, however, which he proposed was disapproved of by the vestry: now it is to be observed that the incumbent has no authority in the seating and arranging the parishioners, beyond that of an individual member of the vestry, and that which his station and influence in the parish naturally give him. He may properly object to a plan which is generally inconvenient;—which diminishes the accommodation in the church;—which disfigures the building;—which renders it dark and incommodious.—In any case of this description it is very proper that he should make a representation to the ordinary:—but as to the mere arrangement of seats, if the parishioners can settle that

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*Easter
Term.*

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KNIGHT.

amongst themselves, and to their own satisfaction, and can agree about the expence, there seems but little necessity for the interference of the incumbent: the expence is that of the parishioners; the churchwardens are bound to repair with the consent of the vestry; it is not the vicar, but the vestry, which appropriates the seats; the general superintendence and authority in allotting them rests with the ordinary.

In 1807, the parishioners having held several vestry meetings, and agreed upon a plan for erecting a new gallery, applied to the ordinary for his faculty: upon the citation issuing, the only person who appeared to oppose it, was the Rev. Mr. Tattersall. The statement made by those who applied for the faculty was as follows:—"That a very useful gallery to consist of five handsome seats in front, with two ranges of sitting places behind, might without detriment to the church, or inconvenience to the other seats, be erected at the west end of the north aisle, in the room of the gallery originally built without authority for the accommodation of the Sunday school children, but no longer used for that purpose, (the Sunday school being discontinued,) and not fit for the reception of families wanting pews; that this new gallery would be ornamental to the church, being upon a plan corresponding with the present gallery in the middle aisle, which was set up under the inspection of the vicar, to whom the plan of the new intended gallery had been submitted before the removal of the old one; and he expressed no dissent thereto.

"That Sarah Knight, and four others of the principal inhabitants, were willing at their joint expence, to erect the seats, and desirous of having them appropriated to themselves and their families, and that the parishioners in vestry had given their unanimous consent to this. That the other inhabitants are desirous that the two ranges of sitting places behind the enclosed pews should be erected at the parish expence, and for the general accommodation of the inhabitants; to which the vestry also gave their unanimous consent."

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Term.
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KNIGHT.

This seems a fair representation of the matter; and, unless strong ground of opposition can be laid, will be sufficient to authorize the grant of the faculty.

The vicar objects,

First, *That no vestry was called to agree to this appropriation.*

This is not correctly true, for notice was given that persons should apply who wished to have pews appropriated to them. These persons were named, the plan was produced, and approved; if no parishioner appeared, the presumption is, that no one disapproved.

Secondly, *That the former gallery was pulled down without authority, and ordered by the ordinary to be replaced.*

It was ordered to be replaced upon an Ex parte representation, which omitted to state that it had been erected without authority, and that the use of it was at an end.

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KNIGHT.

Thirdly, *That no plan was annexed to the process.*

It is not necessary that the plan should be annexed to the process ; it was produced to the Court, and at the vestry ; and no objection has been taken to the plan itself.

Fourthly, *That the gallery is to be erected upon a larger plan than the former gallery, and the gallery was ordered to be restored on the same plan.*

This does not go to the question ; the question is, whether it is not proper that it should be so erected ?

Fifthly, *That the occupiers of the other seats will be incommoded.*

None of them appear, or object to the measure either in the vestry, or in answer to the process ; and there is no proof whatever of this assertion.

Sixthly, *That there are owners of other estates of greater value who have no pews, and that some of these parties are not owners of the messuages which they occupy.*

This objection is open to the same answer as the last ; the parishioners are acquainted with this proceeding, and do not oppose it.

Not one of these objections apply to the expediency of the measure ; and I must express my regret that upon such grounds as these the vicar should so long have opposed this accommodation in his church ; that accommodation was called for, is admitted, and the plan of it has been very generally approved of, and is satisfactory to the parties

principally interested; it is proved also, that it will not disfigure, but rather be ornamental to the church.

It appears, therefore, that the faculty was very properly decreed by the Court below, and that the surrogate very properly took a view of the church himself; it is also very proper that the faculty has not appropriated, as the terms of the citation called upon it to do, the seats to the messuages, but to families resident in the parish: great inconvenience has been found to arise from annexing pews to houses;—the houses become dilapidated;—the inhabitants of them fail in their circumstances;—new houses are erected,—and the occupiers of them want pews. It is very desirable that after due time has been given as encouragement to those who build them, that seats should return to the disposition of the ordinary: the form of the grant should be, “as long as they continue inhabitants of the parish; or, “as long as they continue inhabitants of the parish, “and occupiers of the messuages stated;” the former of these is the more usual, as it gives no notion of annexing to houses.—I affirm the sentence of the Court below.

With respect to costs, none were given in the Court below; but I hardly think that the original opposition to this measure, and the contest which was carried on, justified so lenient a sentence; at least the vicar should have been satisfied with that decision: the appeal has some appearance of being vexatious. Looking, however, to the relation in which the parties stand to each other, and con-

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Raster
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sidering how desirable it is that they should return to a good understanding together, perhaps it would be advisable that the parishioners should wave pressing the costs. I shall allow the question to stand over for their consideration.

May 24. Costs were given against the vicar.

PREROGATIVE COURT OF
CANTERBURY.1811.
Easter
Term.
May 15.

PHILLIPS v. BIGNELL AND OTHERS.

DANIEL Lampett, a yeoman of Horknorton, in the county of Oxford, died in the year 1796, having made a will, by which he constituted Richard Benjamin Bignell, Williams Meads, and David Salmon, his executors; and bequeathed property of various descriptions to be equally divided amongst his three daughters; their several shares to be paid them on their marriage, or their attaining the age of twenty-one years; but in the event of one of them dying before either of these contingencies, then her share was to be equally divided amongst the survivors.

An executor bound to exhibit an inventory and account, at the suit of a party interested in the property for which he is executor.

The executors took probate of the will in the Prerogative Court of Canterbury, in October 1796. The two eldest daughters married, one in 1805, the other in 1806, and their husbands received their respective shares of the property;—the youngest was still a minor, (about seventeen years of age,) and unmarried.

In November 1810, a citation issued at the promotion of the husbands of the two married sisters against the executors, to exhibit a full and particular inventory of all and singular the goods, chattels, and credits of the deceased, which at any time since his death had come to their hands, posses-

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Term.
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PHILLIPS
v.
BIGNELL.

sion, and knowledge. The executor objected to comply with this citation, on the ground that they had paid the two eldest daughters their shares of the property on their respective marriages, and had received their husband's receipts in discharge of them; and further, that the sums paid them exceeded in amount their distributive proportion.

Swabey, for the executors.

Burnaby, contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is a proceeding against the executors of Daniel Lampett, for the purpose of compelling them to exhibit an inventory and account:—the executors object to doing this, but the law does not readily admit objections.

The Canons require an inventory to be exhibited, even before probate is granted; and this was the old practice of this Court, and, indeed, is still the practice in some country jurisdictions. The (a) statute requires executors and administrators to exhibit inventories as part of their duty, without any proceedings to call upon them to do so.

The modern practice, however, is certainly not to render an account unless it shall be called for; but the executor must remember that he has bound himself by his oath to render a just account when he is by law required. The Court may, and in some instances does, for the protection and security of the parties interested, require ex officio that an inventory shall be exhibited; and though the Court

(a) 21 H. VIII. c. 5. s. 4.

does not exact this in all cases, still it always will, where a party having an interest in the property applies for it.

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Term.

PHILLIPS
v.
BIGNELL.

It has been laid down in a variety of cases, that a probable or contingent interest will justify a party in calling for an inventory and account. This was so held in *Salter v. Sladen* (a), *Snow v. Strutt* (b), and *Myddleton v. Rushout* (c). It is not necessary to particularize the circumstances of these cases; but in all of them it was laid down that a probable or contingent interest was sufficient, because the production of an inventory was so much a matter of duty, that the executor was bound to exhibit it, even where there was *an appearance* of interest in the party calling for it. My predecessor so much discouraged all hanging back in cases of this description, that he has generally condemned the parties who have been guilty of it, in costs.

In the present case, the executors proved the will in October 1796; they are now cited by two of the daughters of the testator, who are also two of the substituted legatees to exhibit an inventory: it is argued, that they are barred from making this demand, because their respective husbands have received releases for their several shares from the executors. On the other hand, it is stated that the accounts are loose and incorrect; this again is denied, and it is asserted in reply, (which certainly appears very extraordinary,) that the sums paid exceeded the amount of their respective shares.

(a) Prerogative, Michaelmas Term, 1792.

(b) Prerogative, Hilary Term, 1793.

(c) See the next case, p. 244.

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PHILLIPS

v.

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Here then is a considerable estate, consisting of various descriptions of property, to be sold and divided,—monies to be advanced for the maintenance and education of children,—interest to be calculated on the respective shares,—and in short, no estate so circumstanced, that one can scarcely figure to oneself a case in which a more exact inventory and account ought to have been kept and stated.

Two out of the three daughters are married, and accounts of their property have been rendered to their husbands; but it is not averred that they were full and perfect accounts, all the executors state is, that the husbands received the shares, and gave releases for them; and the husbands might on their respective marriages, have accepted them in unsuspecting confidence; but they are mere receipts, not releases, and certainly not releases given on a due investigation of all the accounts. I am not prepared to say that they would be a bar, even if the parties had no contingent interest; but here they are residuary legatees, to them they can be no bar; if the unmarried sister were to die before marriage, or under age, they would be entitled to her share: but, independently of this consideration, the share of the unmarried sister cannot be ascertained without a precise inventory and account; and the Court would almost *ex officio*, for the protection of her interest during her minority, direct an inventory and account to be exhibited.

Lapse of time may sometimes weigh with the Court; the Court would be unwilling to open old accounts where documents have been lost, and

vouchers destroyed; but the argument founded on lapse of time does not apply in the present instance, since as one of the parties is a minor, all the documents and vouchers must have been preserved, and it is difficult to surmise why the executors should refuse to produce them;—when the minor attains the age of maturity, or marries, she will have an undoubted right to call for them. No inconvenience, therefore, can arise to the parties from exhibiting them.

Upon the whole, I think there is no ground or colour for this refusal; when parties are acting fairly, they are rather desirous of making a full disclosure than of attempting to raise objections to it. The Court is bound to discourage and discountenance any backwardness in cases of this description; and I think I am only following the example of my predecessor, when I condemn the executor in costs.

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*Easter
Term.*
PHILLIPS
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BIGNELL.

1797.
Easter
Term.
May 12.

MYDDLETON v. RUSHOUT.

An executor bound to exhibit an inventory and account, at the suit of a party having an interest in the property for which he is executor.

A CITATION was taken out by the widow of Richard Myddleton, Esq., of Chirk Castle, against the executors of her husband, to produce an inventory; the executors objected to comply with the citation, on the ground that the widow was not so interested as to entitle her to call for an inventory, as by her marriage settlement she had 500*l.* per annum settled, or trustees for her. To this it was replied, that there was a covenant that there should be paid at several instalments money to make up 5000*l.* stock, or in the event of her surviving her husband, so much as would make up the 5000*l.* stock; that nothing as yet had been paid towards making up his sum, consequently, the 5000*l.* stock was due to her, and she was entitled to an inventory.

Sir William Scott, for the executors.

This application rests on two grounds; *first*, That an executor is under a general obligation to deliver an inventory without the application of any person. In this suit is a creditrix, and therefore has a specific interest.

As to the first point, it is true, the executor engages to furnish an inventory when required by law; but he is not considered as imperiously ob-

liged to deliver it, unless at the instance of a person interested; at least it is not the practice of the Court *ex officio* to call for one; therefore, there has been no failure of duty. *Secondly*, The parties usually applicants are the next of kin, or creditors who are immediately and directly interested; but here the party states herself to be interested under a marriage settlement by which money was to be paid, partly in the lifetime of the husband, and partly after his death, to trustees for her use; thus she is a creditrix only in equity; the legal creditors are the trustees; the widow's interest is merely equitable, and not to be attended to in a mere court of law.

When legacies are in trust, it is always held that the trustee, and not *cestui qui trust*, must sue.

Dr. Nicholl contra.

The Court will call for an inventory on the shewing of any kind of interest. In *Sladen v. Salter*, Prerog. Mich. Term 1792, a suit was pending before the Lords of Appeal on a question of joint capture; it was not determined whether Sladen would be entitled to claim any thing from Salter; and, therefore, it was argued that he had no interest to entitle him to call upon Salter's executors for an inventory; but the Court held that where even the party can shew any kind of interest, it will enforce the call for an inventory. That this could be no hardship, for the executor was bound both by the stat. of H. VIII., and his oath, to do it, though this was not ordinarily, and in all cases enforced; the Court held that a probable interest was sufficient, and said that it knew

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Term.

MYDDLETON

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RUSHOUT

of no case where such an interest had been shewn, and the application had been refused.

The wife has an interest here; a certain sum should be raised for her use; none of that money has been paid; she has an interest to discover the effects; suppose she wanted to institute a suit to compel the trustees to recover, it would be necessary to see all the assets; but she is the person really interested, for the trustees are to pay over to her.

JUDGMENT.

SIR W. WYNNE.

This is a suit brought by the widow against the surviving executor of her husband for an inventory; the executor has appeared under protest, stating a settlement, and that on 2,500*l.* being granted to Mr. Myddleton, 500*l.* was assigned to trustees to be set apart annually, paying interest to her; and if by this payment at the death of Mr. Myddleton, it did not amount to 5000*l.* stock, his executors were three months after his death to pay that sum to trustees for her use. It is stated that no such sum has been paid, so that 5000*l.* is now due to her from the estate; this is not denied, but it is contended that she is not a legal, but an equitable creditor, and that therefore she is not entitled to an inventory.

I never heard of this distinction, nor can I see any reason for it; the legal interest cannot be enforced in the Ecclesiastical Court more than the equitable one.

The statute of H. VIII. requires all executors to give an inventory; this is not required of all exe-

cutors in practice, and the Court always enquires into the interest of any party requiring one; but when it sees any kind of interest, it enforces that which is by law generally required.

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MYDDLETON
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I know of only one case in which it could be refused; *i. e.* if a creditor had brought a suit in Chancery for a discovery of assets in such a case, the Court has said that the party shall not proceed in both Courts; this is not suggested here. I see no ground for the objection, and I pronounce against the protest, with costs.

Delegates,
1841.

HIGH COURT OF DELEGATES.

ACKERLEY v. OLDHAM and WILBRAHAM.

An Appeal from the Consistory Court of York.

June 17. The Judges' delegates who sate under this Commission were

Mr. Baron THOMSON,
Mr. Justice CHAMBERLAIN,
Mr. Justice BAYLEY,
Doctor ARNOLD,
Doctor ADAMS,
Doctor PHILLIMORE,
and
Doctor EDWARDS.

A CITATION issued in the Consistorial Court of Chester, at the suit of Lievesley Oldham and John Wilbraham, devisees and executors of Mary Done, deceased, against John Hawksey Ackerley, of the city of Bath; calling upon him to take upon himself letters of administration, and to exhibit an inventory of the goods, chattels, and credits of his father, David Ackerley, deceased; and also to

render a true and just account of his administration of them; he, the said John Hawksey Ackerley, having, as was reported, intermeddled in and possessed himself of the goods, chattels, and credits of his deceased father.

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ACKERLEY
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OLDHAM.

Edward Pate then exhibited his proxy for Lievesley Oldham and John Wilbraham, devisees and executors named in the last will and testament of Mary Done, widow, deceased, and alleged that David Ackerley, late of the city and diocese of Chester, gent., deceased, departed this life some time since intestate, leaving behind him Frances Ackerley, widow, his relict, and John Hawksey Ackerley his only natural and lawful child; that the said Frances Ackerley departed this life without taking upon her the administration of the goods, chattels, and credits of the said deceased; and that the said John Hawksey Ackerley had intermeddled in and possessed himself of the said goods, chattels, and credits of the said David Ackerley, deceased, and now resided in the city of Bath, within the diocese of Bath and Wells; and prayed a requisition to be directed to the bishop of Bath and Wells, his vicar general or surrogate, to cite the said John Hawksey Ackerley to appear in the Consistory Court of Chester, on Thursday the 15th day of October, 1807, then and there to take upon him the letters of administration of the goods, chattels, and credits of the said David Ackerley deceased, and to exhibit a true and perfect inventory of the same which had come to his hands, possession, or knowledge.

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OLDHAM.

and also to render a true and just account of his administration of them.

The citation was served by letters of request from the Chancellor of the diocese of Chester to the bishop of Bath and Wells, on Mr. Ackerley at Bath.

Oct. 15, 1807. Pate (proctor for the executors of Mary Done,) returned the citation in the Court at Chester.

Oct. 22. Baker exhibited a proxy for Mr. Ackerley, and prayed time to shew cause till the next Court.

Nov. 5. Baker prayed further time,—and time was allowed till the next Court.

Nov. 12. Baker prayed, and the surrogate decreed a requisition to take a declaration or affidavit of the defendant, returnable on the second Court day.

Nov. 26. Baker alleged the requisition to have been duly executed, but not yet returned to him; and he prayed time to prove the execution thereof to the next Court, which was granted.

Dec. 3. The defendant having been twice publicly called,—Pate accused his contumacy in not taking upon him the administration of the goods, chattels, and credits, of David Ackerley the deceased in the cause, nor shewing any lawful cause to the contrary, and prayed that he might be reported contumacious; and in pain of his contempt to be excommunicated, which the surrogate decreed accordingly. Baker dissenting, and it being alleged that the defendant still resided in the diocese of Bath and Wells; the surrogate also de-

creed a requisition to the bishop of that diocese, his vicar general or surrogate, to cause the defendant to be denounced, and declared excommunicated.

From which decree, and the sentence of excommunication issued in that behalf, in the name of the Rev. Thomas Mawdesley, surrogate of the Rev. Thomas Parkinson, D. D. vicar general, and official of the lord bishop of Chester.

From this sentence an appeal was interposed to the Consistorial Court of York,—where the decree of the Court of Chester was confirmed.

Dr. Swabey and Mr. Heald, for the appellant.

The citation issued without any affidavit to lead it,—on the mere allegation of the parties, that they are the executors of a Mary Done, widow; but what interest, if any, they or their testatrix have in the effects of the intestate, is not set forth;—it will be said Mr. Ackerley has appeared by his proctor absolutely,—and prayed time to shew cause when he might have protested against the proceeding, as a nullity;—is, however, the want of any apparent interest in Messrs. Oldham and Wilbraham, to call upon Mr. Ackerley to the effect of the citation, the only ground of exception to the decree by which he has been declared excommunicated? Certainly not;—for supposing him to have intermeddled in the effects of his deceased father, and that Mary Done was in her lifetime a creditrix of his estate; the Court had no jurisdiction to compel him to take out letters of administration.

He may possibly have acted as an executor de son tort, and if so, have subjected himself to the legal inconvenience consequent on such conduct in

1811.

*Hilary
Term.*

ACKERLEY

v.

OLDHAM:
Consistory
Court of Chester,
1807,
Dec. 3.Consistory
Court of York,
1809, July 6.

1811.
Hilary
Term.
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 ACKERLEY  
 v.  
 OLDHAM.

a court of law. But that would neither give to a person intermeddling a right to letters of administration, nor compel him to take the same upon him, if otherwise entitled to ask the grant from the ordinary.

A next of kin does not stand on the same footing as an executor, who, by having intermeddled in the effects of his testator is held to have accepted the office; and is thereby bound to proceed in his functions, and may be compelled to take probate; and the creditors cannot release him from this obligation.—An executor may do many things before probate;—but a next of kin in the case of intestacy by an improper intermeddling, becomes only an executor in his own wrong,—and is not even called an administrator, as no man can become one by his own act, nor unless by the appointment of the ordinary.

In the present case, Mr. Ackerley left a widow, who in her life was entitled to be preferred, and the acts of the son could not supersede that title.

Take any other case, where there may be several next of kin in an equal degree;—and what would be the mischief if one of them by his own misfeasance could acquire a preference over the claims of the others, and controul the choice and discretion of the ordinary.

These, and other considerations, ought to have occurred to the Judge of the Court, below, by whose decree Mr. Ackerley with great reason complains that he is aggrieved, before he proceeded to excommunicate the appellant for not taking upon himself the administration of the goods of the de-

ceased intestate,—he not having, as alleged, intermeddled with and possessed himself of them. Besides that, he had not before assigned him so to do, and therefore has visited him with punishment for a contempt which he has not incurred.

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OLDHAM.

The act is utterly unsustainable; and the respondent, having attempted to support it in two instances, must be liable to be condemned in all the costs of these proceedings.

*Dr. Jenner, contra.*

The parties pretend an interest, and this is sufficient ground for the citation; by having appeared they admit the jurisdiction; and it is too late now to stir the question of right; besides in reason and equity, it does not appear why the next of kin should not be liable as well as the executor.

The Judges pronounced for the appeal, and dismissed Mr. John Hawksey Ackerley from the original citation returned in the Consistory Court of Chester, and from all further observance of justice in this cause; but without costs.

1811  
Trinity  
Term.



Moss

v.

BRANDER.

June 19.

## MOSS v. BRANDER.

### JUDGMENT.

SIR JOHN NICHOLL.

A will set aside  
for want of  
adequate  
proof, and one  
of an earlier  
date estab-  
lished.

This case arises upon two wills of Hannah Brander, and it has required the full attention of the Court. The deceased was a femme coverte.—I have already (a) decided, that under a power given to her in the form of a bond, he could make a will; and that I am bound to enquire into the factum of the instruments propounded.

One of them is propounded by Moss, who is not an executor, but the residuary legatee; it is dated the 25th of August, 1801.—The other is propounded by the husband, and is dated the 25th of May, 1806.

The former is regularly prepared, formally executed, and attested by two witnesses. The drawer of it (Mr. Bevan) has been examined; and he proves that the instructions were given by the deceased, that he prepared the will from those instructions, and delivered it to her. One of the subscribing witnesses proves the execution; and the death, and character, and handwriting of the other, are also proved. So that the factum of this will being established, it would be entitled to probate, unless revoked by the subsequent will; and the true question in this case is, the factum of the second will.

(a) Trinity Term, 1809.



This will is not formally drawn up;—it is on a scrap of paper written on both sides;—it is attested by only one witness Mr. Wilson who is also the drawer of it;—he describes himself as a calico glazer, and says, “He was slightly acquainted with the deceased for about two years, by occasionally calling at her husband’s house; that on a Sunday afternoon, about the 25th of May, 1806, he called; and after having been there some short time, the deceased asked him if he would write her will; the deponent told her he had no objection, but it was a thing he had never done for a person in his life. Her husband offered to go for some paper; the deceased said no, there is a piece on the table that will do; I have not a great deal to say, for I am very ill, and shall not be able to sit up long.” That he then wrote according to her order; and the paper being shewn him, he says, “that he drew and wrote the same by the dictation and desire of the deceased, and in her presence, and in the presence of her husband; that he then read it all over to her, and she said she was very well satisfied with it, and asked her husband if he was so, and he said yes. That the deponent then asked the deceased if she would sign it, and she said yes, and set her name thereto. That he thought there should be a seal; she said, there is one on the table, I will put it on myself, which she did, and said she declared it as her will, and asked the deponent if it would be proper for him to sign it, and the deponent accordingly signed his name as witnessing the execution thereof.”

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*Trinity*  
*Term.*

*Moss*  
*v.*  
*BRANDER.*

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Now the evidence of this single witness, being the only proof offered in support of the will ;—a will exclusively in the favour of the husband ;—made in the presence of the husband, when the deceased is stated to have been very ill ;—and notwithstanding her marriage, (being then a widow,) she had reserved a power of disposing of certain property, and had actually exercised that power in 1801, in favour of her relations.—The evidence of this single witness, requires to be carefully considered, for it is only on the full belief of his testimony that the will can be established.

His account then is, that he was only slightly acquainted with the deceased by calling on her husband ;—he was, therefore, the friend of the husband ;—that he never drew a will before in his life ;—that this will was written off at once upon this sheet of paper, without any draft, or previous note or memorandum ;—that it was immediately read over, —and immediately signed.

Then, let us observe how this calico-glazer writing at the dictation of this sick woman, who herself from another paper which has been exhibited appears to have been but an illiterate person ; has expressed this will, —and how the paper is written ;—it is in these words :—

“ This is the last will and testament of me,  
“ Hannah Brander, of Susannah Row, Shore-  
“ ditch, in the county of Middlesex, which I  
“ now make and publish by virtue and in pur-  
“ suance of the settlement made on my mar-  
“ riage with my present husband, Andrew

“ Brander, in manner following:—I give and  
 “ bequeath the sum of five hundred pounds  
 “ of lawful money of Great Britain to my  
 “ present husband, Andrew Brander which  
 “ was settled on me at my marriage with him,  
 “ hereby revoking all former wills by me at  
 “ any time heretofore made, and do declare  
 “ this only to be my last will and testament.  
 “ In witness whereof I have hereunto set  
 “ my hand and seal, this twenty-fifth day of  
 “ May, one thousand eight hundred and six;  
 “ HANNAH BRANDER, (LS.) in the pre-  
 “ sence of witness,

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[“ WILLIAM WILSON.”]

Here then is as perfect and as technical a form of words as could possibly be used, not only in the formal, introductory, and concluding parts, but in the disposition itself;—it is written quite fair,—there is not a single omission,—erasure,—or amending,—except in the spelling of the word following. He confirms, and more strongly ties himself down upon interrogatories, that it was no copy.—He was asked whether he did not make such will from a copy, and his answer is, “No,” and on another interrogatory he says, “I did not hear of the will in favour of her relations till after her death.” “That he will take upon himself to swear, having perused the will of 1801, that he did not take the form of the will from a copy thereof.” So that he even excludes the deceased from having any copy before her; for if she had, he would have mentioned it either in his examination in chief, or on this interrogatory.

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This would be difficult to believe in itself, that persons of this description should be able *uno contextu* to draw up such an instrument in such formal and technical terms; it is equally formal in the introductory, in the dispositive, and in the concluding part.—But what renders it still more difficult of belief is, that the introductory and concluding parts are verbatim the same as in the will of 1801;—and yet the witness does not pretend that that will was then produced;—nor is it likely, when the other evidence comes to be examined, that it could have been produced.—Indeed, it is pretty strongly proved in the case that the instrument was not in the possession of the deceased;—but it is also fully proved that a copy of it was delivered to the husband by his own desire, after the deceased's death;—and the husband admits in his answers that he was not informed of the contents of this will till after the deceased's death, so that it could not have been produced on the 26th of May;—that so precise a coincidence of wording should have taken place without being copied, and in a paper not drawn by a professional person, is almost beyond belief.

There is another circumstance of suspicion, namely, that the ink of the signature is quite of a different colour from the body of the will;—the whole name is written in a much deeper ink, and all is equally black;—and yet the witness says it was signed by the deceased immediately after the body of the instrument was written by him.—It is also observable that his own name, which he says was written after the deceased's signature, is in the same coloured ink as the body of the instrument.

When this name was written,—or how the signa-

ture was obtained,—or whether it is in the deceased's handwriting, (for it is a hand easily imitated,)—or how it was signed,—it is not necessary for the Court to conjecture ;—but if the case rested here, I should find great difficulty in giving credit to this evidence.

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Though Mr. Brander gave in a second plea, yet he has not attempted to aver any circumstance to support the act;—there is not the testimony of a single witness declaring that the testatrix intended to benefit her husband by this property;—there is nothing in the shape of a recognition,—though she lived near a fortnight afterwards.

In answer to a charge that he treated her cruelly in order to obtain a will from her, he has produced two witnesses, who say that they appeared to live comfortably together, and that is all.—There is nothing stated of particular affection and regard towards her husband,—or of alteration of regard towards her relations.

He has pleaded the finding of this paper after the deceased's death;—but no evidence of that fact, or even that it was in existence till long after her death, has been produced;—there is nothing, therefore, to uphold the witness Wilson.

How then stands the evidence on the other side?

Ann Bull was intimate with the deceased and her opposite neighbour for ten years; she says, “ that the deceased told her about a twelvemonth before her death, that her husband had given her a bond on her marriage that she should have 500*l.* at her own disposal; she often told her she had made her will, and within two or three days of

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" death told her she would not alter it; that about
 " a twelvemonth before her death, she brought
 " some papers to the deponent, and desired she
 " would take care of them, and not let Brander or
 " any other person know that she had them, and
 " said they were the bond, and the leases of her
 " houses, and her will; that soon after the de-
 " ceased being very indifferent, the deponent
 " wished her papers to be removed, that the de-
 " ceased brought a tin box, put her papers into it,
 " took them away, and left them as she believes
 " with Sarah Leighton. That the deceased many
 " times told her that her husband wanted to get
 " possession of her will; but that he never should."

SARAH LEIGHTON says,

" That the deceased brought a tin box to her,
 " said her will was in it, and requested that she
 " would take care of it for fear her husband should
 " get it; that the deceased sent for the deponent
 " several times during her last illness, but she was
 " at Walthamstow; that when she returned, she
 " understood that the deceased had sent her niece
 " for the tin box, and that the deponent's daughter
 " had delivered it to her."

ANN PASCALL, (the deceased's sister,) deposes,

" That on the morning after the deceased's
 " death, she told Andrew Brander that she had
 " the deceased's will, and all her writings; and
 " Brander said, ' that's right, take care of them,
 " I only want a copy.' That a copy of the de-
 " ceased's will was made and sent to Brander."

Here is a strong adherence to the will of 1801;—
 an anxiety that the instrument should not come

within reach of her husband;—it satisfies me also, that the will of 1801 was not produced to the husband and Wilson on the 25th of May, when it is pretended this last will was made:—Brander, desiring to have a copy is a strong disavowal of the will of May 25 being then made, and may account for that instrument, when it was afterwards produced, being in the same technical form as the will of 1801.

ANN BULL, (the witness first mentioned), also says,
 “That the deceased frequently told her Mr.
 “Brander used her ill because she would not alter
 “her will, and make a will in his favour, but that
 “she never would; that he used her ill one night
 “on the account she would not put her hand to a
 “paper because he would not let her see what
 “it was.”

This would impose upon Brander the burthen of proving very satisfactorily, that a will made in his presence, and when his wife was described as very sick, was the free and voluntary act of the deceased.

The witness goes on, “and that on the next day
 “after she had so refused she found the paper in a
 “box,—that it was a will Brander had made in his
 “own favour, and she had copied it off and given
 “it to some friend, and put over the top of it that
 “it was a forged will in case it should be brought
 “forward after her death.”

This account in its different parts is confirmed by three other witnesses;—the paper so copied by the deceased is before the Court, and Elizabeth

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Pascal, (a niece,) says it was deposited with her father.

The instrument purports to be a will of the deceased's, giving her leasehold house and all her property to her husband, and is dated in 1803, but not signed; at the top there are written these words, "this is the copy of a forged will in my name"

This evidence on the one hand renders it most highly improbable that the deceased should voluntarily have departed from the will of 1801, and disposed of her property in favour of her husband;—and on the other, must excite the greatest jealousy of an instrument produced by the husband,—and supported by one single witness in the manner already stated.

ELIZABETH PASCAL says,

"That on the Sunday previous to the deceased's death, she was sent for to attend her; that on the Wednesday following, Mr. and Mrs. Cheswick drank tea with Brander; that Brander came down and told the deponent that her aunt was going to alter her will, but that there was a witness not come; that a person came soon after, but Brander took care she should not see him; that Brander came down into the kitchen, and fetched the pen, and said, he is come, we shall soon settle the business. That Mrs. Cheswick soon after came down, and the deponent asked her if her aunt had been settling her will; she said she had not. That the deponent not feeling fully satisfied, asked her aunt herself; the de-

"ceased said, 'No, she had had a paper brought to her to sign, but she said, let those that make wills sign them, she would sign no more than what she had already signed, and that should stand good.'" She made similar declarations on the following night.

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That there was some attempt to obtain a will on this Wednesday, and that the deceased declined it, is confirmed by Brander's own interrogatory (a).

Whether this was a proper or an improper attempt, the Court has it not in its power to judge, for Mr. Brander has not thought proper to explain this transaction; he has not pleaded it, though he has given in a second allegation; nor has he examined Mr. Selby, or Mr. and Mrs. Cheswick; therefore, the appearances and presumptions are against him. But the transaction bears upon the case in another way; it renders it highly improbable that this will of the 25th of May, (only ten days preceding,) should have been made at all; for if it had been made, it must have been in some manner referred to, and recognized by Mr. Selby; and if it had

(a) The interrogatory was addressed to Ann Pascal, and to this effect:—"Were you present in the room with the deceased about two days preceding her death, when Mr. Brander brought a will to her as articulate, and requested her to sign it, which she refused?—Will you take upon yourself to swear that it was Mr. Brander himself, who brought the said will to the deceased?—Upon your oath, was not that will brought by Mr. Selby, the attorney who prepared it?—Will you swear that the ministrant requested the deceased to sign it, and that any thing was said upon the subject of signing the same, either by Mr. Selby or the ministrant."

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been so recognized, that circumstance would certainly have been pleaded, and proved.

Within two days afterwards the deceased dies:—what is Brander's conduct?—The will of the 25th of May is not produced;—Mrs. Pascal tells him she has the deceased's will;—the will of 1801, and other papers. He replies, "that's right, take care of them, I only want a copy."—He receives a copy;—he enters a caveat against it,—but does not produce his own will, or assert its existence;—the objection he took to the will of 1801 being, that it was not a legal execution of the power.—In August 1806, he files a bill in Chancery against Ann Pascal, to recover possession of the leases, and other papers relating to the deceased's houses; in that bill he asserts that the deceased had died intestate, not suggesting then that he had in his possession a will which revoked all former wills. Ann Pascal, in answer to Brander's bill, claims her right under the will of 1801, and Brander has not ventured to proceed with his suit. And it is not till May 1807, that this latter will first makes its appearance.

A caveat being entered against the will of 1801, Moss, the surviving executor, being in indigent circumstances, and having no direct interest himself, and being in some doubt whether the will of 1801 was a good execution of the power, does not institute a suit; and the matter having rested quiet for near a year, Brander produces the will of May 1806, and takes administration with that paper annexed, in May 1807.

In explanation of the bill in Chancery, in which he stated the deceased to have died intestate, Mr.

Brander in his plea alleges, "that he did acquaint
 "his solicitor, Mr. Samuel Parkinson, of the will
 "propounded by Moss, and also informed him that
 "the deceased had made another will, bequeathing
 "to him the property she had power to dispose of;
 "but what was become thereof, he did not know."

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This is an important fact; for at least it would have shewn that he averred the existence of this will shortly after his wife's death, and it would have taken off the effect of his having alleged in his bill that she died intestate. Mr. Parkinson is produced and examined on this article of the plea, and on this article only. Mr. Parkinson, in his deposition in chief, speaks to the filing of the bill, and says, "that in the bill it was stated that  
 "Hannah Brander was dead intestate, and that  
 "Andrew Brander was then taking steps for obtaining letters of administration of her effects;  
 "that Pascal kept possession of some writings  
 "under pretence of there being a will, but that  
 "his wife had no power to dispose of those leases  
 "by will."

Not suggesting, therefore, that such will was revoked by a subsisting will; but on this part of the plea, "that the deceased had made another will  
 "bequeathing to him the property she had the  
 "power to dispose of; but what was become  
 "thereof he did not know."—In this very important part of the article, the very gist of it *Mr. Parkinson knows not to depose*. This is rather a strange way of getting over it: the examiner ought to have required a specific answer to that part of

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the article; but coupling this with the answer of the witness to the interrogatories, the Court is at no loss what inference to draw from it.—He is cross-examined directly to this fact, on the third interrogatory.—He had answered this interrogatory, but he afterwards has that part of his answer expunged, and then instead of further *knows not* to answer, says, and further *declining* to answer:—and in like manner he declines answering several other interrogatories.

Now, whether he was or was not bound to answer the other interrogatories may depend upon their contents, and it is unnecessary to examine into that point; but in his deposition in chief to that fact so pleaded, and to this interrogatory directly applying to the fact pleaded, I think he was bound to answer.

The privilege of not answering to facts communicated to him confidentially by his client is not the privilege of the attorney himself, but of the client; and if the client waves the privilege, the attorney cannot refuse to answer.—Here Brander had pleaded the fact;—had vouched Parkinson, and had produced him on this very article;—he has sworn to speak the truth, and the whole truth.—This was a waiver of privilege as to this fact;—and he being produced to prove the fact, the adverse party had a right to cross-examine to it. Mr. Parkinson, however, having declined to answer when he was bound to answer, the Court must infer that he negatives the fact;—it is pretty much the same as if he had expressly said that

Brander did not communicate to him in August 1806 the existence or making of this will of May 1806.

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If so, if consulting with his attorney at this very time in August 1806 upon this very subject, *vis.* his right to the deceased's property—that property claimed under a will of 1801; relying only that such will was not executed in conformity with the power of attorney, and, therefore, alleging that the deceased died intestate; it is next to incredible that the deceased could have made this will with an express clause of revocation, and in the presence of Brander himself, and that Brander should never have mentioned such a circumstance or transaction to Mr. Parkinson.

At all events, supposing Parkinson was bound to decline answering, there is then no proof that Brander did mention it; and the case must be considered as one in which there is an absence of proof.

That Brander made any search for the will on the death of the deceased,—or ever intimated when Mrs. Pascal gave him a copy of the will of 1801 and claimed under it, that the deceased had made a subsequent will, there is no proof.

When the will was made;—whether the body of it was written before or after the death of Mrs. Brander;—whether it is or is not of the handwriting of the deceased;—it is not necessary for this Court to decide: the party setting up the instrument must furnish proof that it was made by a free and capable testatrix.

Putting then in one scale the evidence of this single subscribing witness, supported only by two

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witnesses to similitude of handwriting;—in the total absence of any testamentary declarations or recognitions of such an act;—and without any circumstances shewing a probability that she should so execute the power given to her by her marriage settlement.—And putting into the other scale the inconsistency between the instrument itself, and the account given by the subscribed witness,—the acts,—the conduct,—and the declarations of the deceased herself, contradicting the whole transaction,—and the acts,—conduct,—and declarations of Brander himself, so inconsistent with the making of this instrument.—I feel no difficulty in pronouncing that he has failed in proof of this will; and as the transaction he has undertaken to prove, whatever it was, passed within his own knowledge, he having failed to prove it, has, I think, rendered himself liable to costs.

I therefore pronounce for the will of 1801, and condemn Mr. Brander in the costs of this suit.

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HIGH COURT OF DELEGATES.

Delegates,  
1811.

WATSON v. THORP.

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*An Appeal from the Consistory Court of York.*

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The Judges who sate under this Commission      June 21.  
were

Mr. Justice LE BLANC,

Mr. Justice CHAMBRE,

Mr. Baron GRAHAM,

Doctor ARNOLD,

Doctor PHILLIMORE,

and

Doctor EDWARDS.

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**THIS** was a cause of office, originally brought by citation, and articles in the Consistorial Court of Durham, at the promotion of the Rev. Robert Thorp, D. D. Archdeacon of Northumberland, against the Rev. George Watson, D. D. Rector of Rotherham, in that county, for the lawful correction and reformation of his manners and excesses, —and more especially for his profligate life and

A clergyman  
suspended for  
three years  
for immoral  
conduct.

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conversation; and the crime of adultery, fornication, and incontinency by him committed.

The articles, after stating that the party proceeded against had been for thirty years a priest or minister in holy orders of the Church of England,—and for ten years rector of Rothbury;—exhibited a copy of the mandate addressed by the Bishop of Durham to the Rev. Dr. Thorp, Archdeacon of Northumberland, for the induction of Dr. Watson into the possession of the Rectory and Parish Church of Rothbury; and then proceeded to state in detail the several charges of which he was accused.

Several witnesses were examined upon these articles, who fully proved them.

Consistory  
Court of Dur-  
ham, 1808,  
Oct. 7.

Whereupon the Consistory Court of Durham pronounced the following sentence:—

“ That the said Rev. George Watson, clerk, doctor in divinity, *shall be suspended for the space of three years, (to commence from the time of publication of such suspension for that purpose in the Parish Church of Rothbury aforesaid,) from all discharge and functions of his clerical office, and the execution thereof, viz. from preaching the word of God, administering the Sacrament, and celebrating all other duties and offices in the said parish and Parish Church of Rothbury, and elsewhere, in the diocese of Durham, and from all advantages and benefits of the said rectory and benefice, and from taking and receiving the tithes, rents, profits, and emoluments of the said rectory.* And the said judge did thereby suspend the said George Watson accordingly, and did condemn



him in the costs of suit; which costs he did also pronounce, decree, and declare, after taxation thereof by him, or by some other competent judge in that behalf, the said George Watson, clerk, doctor in divinity, shall be compelled by ecclesiastical authority really and effectually to pay, or cause to be paid, to the said Rev. Robert Thorp, or to his proctor; and did order and decree, *that at the expiration of the said three years, the said George Watson, clerk, doctor in divinity, do and shall exhibit and bring into the registry of this Court a certificate, under the hands of three clergymen in his vicinity, of his good behaviour and morals during the said time of his suspension; and that the said certificate shall be exhibited and approved of by the Court before such suspension be taken off or relaxed; and that the said suspension shall continue in full force, notwithstanding the expiration of the aforesaid time of three years, until the aforesaid satisfactory certificate shall be exhibited and approved of; and did decree a sequestration of all and singular the tithes, rents, lands, tenements, profits, and emoluments, of the said rectory; and did order that the balance which shall be remaining in the hands of the said sequestrator, during the time of the said suspension, shall be applied and disposed of from time to time, as the Lord Bishop of Durham, the diocesan of him, the said George Watson, clerk, doctor in divinity, by writing, under his hand and seal, shall direct."*

From this sentence an appeal was interposed to the Consistory Court of York; which Court af-

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Court of York,  
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firmed the sentence of the Court at Durham, and condemned the appellant in costs.

*Dr. Jenner and Mr. Owen, for the appellant,* took the following grounds of objection to the sentence of the Courts below :

*First,* That there was no proof that the party proceeded against was the incumbent of Rotherham.

*Secondly,* That the sentence was irregular, and such a one as it was not in the power of the Ecclesiastical Court to pronounce.

With respect to the first point, the very form of the articles called for more full proof than had been produced. The suit was brought against Dr. Watson, in his capacity of rector of the parish of Rotherham; the first article pleaded this fact, and without that article the sentence of deprivation could not have been founded. No evidence, however, was produced upon it; not a single witness was examined from the parish to prove it. In a case of this description, which was as much a criminal prosecution as if the defendant had been indicted for bigamy, the mere reputation of his being the incumbent was not sufficient. If an attempt should be made to infer his incumbency from the mandate of induction, the answer would be, that the mandate was no evidence; it was the mere letter of the bishop to the archdeacon, authorising the induction; but there was no proof that he ever was inducted into the living,—that he ever read the thirty-nine articles,—or ever officiated as incumbent,—or received any emolument as such. In suits for tithes it was necessary to prove the in-

stitution as well as the induction of the incumbent. It was so laid down in Buller's Nisi Prius, and Gilbert's Law of Evidence.

If resort should be had to the proxy (a) given

(a) The proxy was as follows :

"Whereas there is now depending undetermined in judgment, before the worshipful Thomas Bernard, doctor of laws, vicar general and official principal of the honourable and right reverend father in God Shute, by divine providence lord bishop of Durham, lawfully constituted a certain pretended cause of the office of the judge, voluntarily promoted by the Rev. Robert Thorp, clerk, doctor in divinity, archdeacon of the archdeaconry of Northumberland, against the Rev. George Watson, clerk, doctor in divinity, *rector of the rectory and parish church of Rothbury, in the county of Northumberland* and diocese of Durham, touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for his lewd and profligate life and conversation, and the crime of adultery, fornication, and incontinency.—And whereas a citation having issued under seal of the Consistorial and Episcopal Court of Durham, against the said Rev. George Watson, and having been returned into Court, an appearance was given thereto on his behalf.—And whereas certain articles or interrogatories have been brought in and now stand for admission in the said Court :

"Know all men by these presents, *that I, the said Rev. George Watson, clerk, doctor in divinity, rector of the rectory and parish church of Rothbury, in the county of Northumberland, and diocese of Durham, party against whom the said pretended cause is promoted as aforesaid, for divers good causes and considerations me thereunto specially moving, do hereby nominate, constitute, and appoint George Bacon, notary public, one of the procurators-general of the Consistorial and Episcopal Court of Durham, to be my true and lawful proctor, for me and in my name to appear before the worshipful Thomas Bernard, doctor of laws, vicar-general and official principal of*

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to the proctor in this suit to establish the fact of incumbency, the answer is obvious: in a criminal suit the recital in the proxy merely follows the description of the party in the citation; and moreover a negative issue has been given to all the articles of the charge. The appointment of a proctor

the honourable and right reverend father in God Shute, by divine providence, lord bishop of Durham, lawfully constituted, his surrogate, or any other competent judge in this behalf, and exhibit this my proxy, and pray and procure the same to be admitted; and by virtue thereof, for me and in my name, if counsel shall advise, to oppose the admission of the said articles or interrogatories; and if the same shall be admitted, to give a negative issue thereto; to see witnesses produced, received, and sworn thereon; publication decreed; and to give an allegation or allegations in writing, produce witnesses, and procure them to be received, sworn, and examined thereon; pray publication, and generally to act and do all and singular other acts, matters, and things, needful and necessary to be done; to conclude the said cause, and have the same assigned for a final sentence or hearing; and to attend, see, and hear a definitive sentence, or other final decree, read, promulged, and given in the said cause, with full power to my said proctor to substitute or appoint any one or more proctor or proctors in his stead and place, as need shall be, or occasion shall require; and whatsoever my said proctor hath already done, or shall or may hereafter lawfully do or cause to be done, in and about the premises, I do hereby promise to ratify, confirm, and allow, for valid. In witness whereof I have hereunto set my hand and seal, this 7th day of March, in the year of our Lord 1807.

LS

GEORGE WATSON.

Signed, sealed, and delivered  
(being first duly stamped,) } MATTHEW THOMPSON,  
in the presence of us, } THOMAS FOGGON.

must be considered as analogous to the appointment of an attorney at common law, which is frequently made antecedent to a charge.

*Secondly*, The sentence goes to exclude the appellant from all ecclesiastical rents and tithes,—from the office of minister,—and from holding any benefice within the diocese of Durham;—it suspends him in fact *ab officio et beneficio*,—and can be considered in no other light than as a temporary deprivation. Moreover, from the form of the sentence, it puts it in the power of three clergymen to deprive him of his benefice for life. We apprehend this to be beyond the power of the Court; for though suspension *ab ingressu ecclesiæ* may be pronounced by the ecclesiastical judge, yet any sentence of deprivation must be pronounced by the bishop in person; it was so held in the case of *Owen v. Fleming* (a). Where a suit was brought by the Churchwardens in the Commissary's Court of Hampshire, against the incumbent of a living for non-residence; the inferior Court held, that he had not shewn sufficient ground for non-residence, and consequently suspended him, and condemned him in costs. But this sentence was reversed when carried by appeal to the Court of Arches.

In *Powlett v. Head* (b), the clergyman was suspended *ab officio et beneficio*; but then the sentence was pronounced by the bishop in person.

The present case goes beyond these; the suspension is not to terminate unless he shall produce

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(a) Arches, Hilary Term, 1733-4.

(b) Consistory of London, 1728.

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a certificate of good behaviour from three clergymen; this is a suspension sine die, and as such illegal and a nullity; a person is only to be punished eo modo quo offendit, and besides it amounts to a suspension which can be pronounced by the bishop alone.

*Dr. Swabey and Mr. Wetherall contra.*

There are various ways of proving facts: they may be admitted, or they may appear on the face of the proceedings, and yet they may be equally legal proofs; this is a mild sentence. In the cases in the time of Queen Elizabeth, which are sound law, deprivation is the usual punishment for incontinency, as may be seen in Lynwood and other writers.

A proxy does not resemble the warrant of an attorney; the proctor by the proxy is constituted dominus litis; he is to join issue on the whole suit. Quo nomine does he give his proxy to the proctor, but by his own description?

The mandate of induction is not merely the letter of the bishop; it is an instrument known to the law; it is usually returned, (it must be admitted erroneously,) without a certificate of execution, loquitur sigillum episcopi; the mandate proves the institution. In *Adams v. Tubbs* (a) in the Instance Court, which was a penal proceeding under the revenue laws, the objection taken was, that there was no proof that the seizing officer was qualified; but the Court over-ruled this on the ground that his proctor had so described the prosecution.

(a) Admiralty Reports, Vol. VII.

But a more serious objection is stated to arise on the sentence itself. In *Owen v. Fleming*, the bishop had appointed a special Commissary in Hampshire, and that by a patent during pleasure; the objections taken to the sentence of the inferior Court were, that there was no citation to lead the monition, that no articles were exhibited, and that the suspension was sine die. The Court of Appeal held that the judge had done wrong, on the following grounds:—

1st. That the appointment of the judge was wrong.

2dly. That, consequently, there was no judge.

3dly. That the answer was not good.

4thly. That the sentence ought not to have been sine die.

5thly. That the clergyman, from the nature of the offence, ought only to have been monished.

In short, there were in that case as many nullities as could well be crowded into a sentence.

*Powlett v. Head* was decided by bishop Gibson, who, having high notions of personal authority, always sate in Court with his chancellor. No inference, therefore, arises from this circumstance occurring in the case.

The difference between suspension and deprivation exists in this, that the former may be pronounced by the chancellor of the diocese, the latter by the bishop alone. All chancellors can suspend; the dean of the Arches can even deprive, but he alone of all ecclesiastical judges is vested with this power.

The suspension in triennium is definite, and so

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far good. In *Dickes v. Huddesford*(a), the sentence was merely in the same words as this.

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(a) *Dickes v. Huddesford*, Arches, June 16, 1794: it was a suit brought by the secretary of the archbishop of Canterbury, against the Rev. John Huddesford, vicar of Lydd, in Kent.

The sentence was as follows:

The judge, by his interlocutory decree, pronounced that the Rev. John Huddesford, clerk, the party accused and complained of, had given an affirmative issue to the libel or articles given in and admitted against him, and that the proctor of George William Dickes, the promoter, had thereby fully proved his intention deduced therein, and he, therefore, pronounced that the said John Huddesford, vicar of the vicarage and parish church of Lydd, in the county of Kent, be suspended for the space of two years, to commence from the time of the publication of the said suspension in the parish church of Lydd aforesaid, from all discharge and functions of his clerical office, and the execution thereof, viz. from preaching the word of God, administering the sacrament, and celebrating all others, duties and offices in the said parish church and parish of Lydd and elsewhere, within the province of Canterbury, and from all profits and benefit of the said vicarage and benefice, and from taking and receiving the fruits, tythes, rents, profits, salaries, and other ecclesiastical dues, rights, and emoluments whatsoever, belonging and appertaining to the said vicarage, and did suspend the said John Huddesford accordingly; and did condemn him in the costs of this suit; and did order and decree, that at the expiration of the said two years, the said John Huddesford should exhibit and leave in the registry of this Court a certificate under the hands of three clergymen in his vicinity, of his good behaviour and morals during the time of his said suspension, and that the said certificate be exhibited and approved of by the Court, before such suspension be taken off or relaxed; and that the said suspension shall continue in full force, notwithstanding the expiration of the term of two years, until the said satisfactory certificate be exhibited and approved of; and did decree a sequestration of all and singular the fruits, tythes, profits, and other



The Court affirmed (a) the sentence of the Courts of Durham and York on every point; and condemned the party appellant in costs.

ecclesiastical emoluments of the said vicarage and parish church of Lydd; to issue under seal of this Court, to be directed to Robert Cobb, Esq. a parishioner and inhabitant of the said parish of Lydd; and did nominate and appoint the Rev. John Goodwin, clerk, also a parishioner and inhabitant of the said parish, to be curate of the said parish, to perform the divine offices of the said vicarage and parish church, during the suspension of the said John Huddesford; and did direct the said Robert Cobb, the sequestrator, to pay to the said Rev. John Goodwin, the annual sum of 80*l.* out of the fruits, tythes, rents, profits, salaries, and other ecclesiastical rights, dues, and emoluments whatsoever, belonging and appertaining to the said vicarage and parish church of Lydd, and to bring into and leave in the registry of this Court yearly, and at the end of every year, a true and faithful account of the fruits, tythes, rents, profits, salaries, and other ecclesiastical rights, dues, and emoluments of and belonging to the said parish, together with the balance which shall be remaining in his hands at the end of such year, to be then and there subject to such order of his Grace the Archbishop of Canterbury, the diocesan, of the said Rev. John Huddesford, until the said suspension shall be relaxed; and ordered bond to be given by the said Robert Cobb, Esq. in the penal sum of 1000*l.* for the due performance of the conditions on which the said sequestration is to be granted, before the said sequestration shall pass the seal. Bogg undertook to have the suspension published on Sunday the 22d instant, or on Sunday the 29th instant; and to certify the same by the third session of this present term, and on taxation of costs, the same time. Bogg.

(a) In this case, (i. e. *Watson v. Thorp*) the Court was of opinion that the admission of the party was sufficient proof that he was rector;—and that the judge was competent to pronounce the sentence.—But the Court doubted as to the requiring the certificate; and also as to its being required that the certificate should be approved of by the judge; considering, however,

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June 19.

HILL v. BULKELEY.

The deposition of a witness, who died before he had been repeated, and before he had been examined on the interrogatories of the adverse party, admitted.

**A**N allegation was offered for the purpose of inducing the Court to receive the depositions of W. R. Dowling, a witness who had been examined in chief, and had signed his deposition, but had died before he had been repeated, or examined on the interrogatories of the adverse party.

*Adams and Stoddart against the admission of the allegation, argued*

That it was no deposition till it was sworn to ;—that the witness had not been repeated, consequently, that there was no verification of its contents upon oath ;—that the rule of practice was strict which excluded any deposition which had not been (a) recognized by the witness from being received by the Court.

*Jenner and Edwards contra,*

Denied that there was an oath after the examination ;—the witness was only repeated to his deposition, and acknowledged it. Whatever security, therefore, was to be derived from the oath, the Court had it, because the oath was administered previous to the examination. They cited a case from Viner's Abridgment, and another from the Chancery Reports, viz, Lord *Arundel v. Arundel*,

that if the certificate when offered should be rejected, it would be an appealable act, it affirmed the sentence of the Courts below on these, as well on the other points.

(a) Si depositio non fuerit coram iudice recognita et repetita, non valet.—Oughton Ordo Judiciorum, tit. 85. s. 8. et supra.

Viner's Abr. Vol. XII. p. 108. tit. Evidence.—Ch. Rep. 90. 10 Car. 1. Ld. *Arundel v. Arundel*.

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## JUDGMENT.

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The examination certainly is not complete,—but under the circumstances, the Court may receive something short of the regular examination. The examination in chief comes as near to a regular examination as it well can, for the deposition was read over, and actually signed. The single defect on this point is, that it was not repeated to him;—and on the other hand, he has not been cross-examined,—but this has been prevented by the act of God.

The case from Viner's Abridgment, though it relates to the practice of another court, is directly in point. There is likewise a case in *Peere Williams, Copeland v. Stanton (a)*, in which Lord Chancellor Parker admitted the depositions of a witness under similar circumstances. In Chancery, it should seem the deposition is considered as complete, when it is read over and signed.

Upon the reason of the thing, and the authorities cited, this evidence is admissible, if the facts pleaded in the allegation shall prove true; the deposition, however, must be read at the hearing of the cause, with some deductions, because it is possible that the cross-examination might have discredited the witness. Subject to these observations, I shall admit the allegation.

(a) *Copeland v. Stanton, Peere Williams, Vol. I. p. 414.*

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## ARCHES COURT OF CANTERBURY.

July 4.

The office of the Judge promoted by NEWBERY  
v. GOODWIN,

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( Brought by letters of request from the Consistory  
Court of Chichester. )

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A clergyman  
in the per-  
formance of  
divine wor-  
ship, not at  
liberty to alter  
or omit any  
part of the  
service.

**THIS** suit was promoted by Francis Newbery, Esq. an inhabitant and parishioner of Heathfield, in the county of Sussex, against the Rev. Dr. Goodwin, vicar of that parish.

The facts and circumstances of the case are fully set forth in the judgment.

### JUDGMENT.

SIR JOHN NICHOLL.

This is a suit against a clergyman for “irregularities in reading the Holy Scriptures,—and for quarrelling, chiding, and brawling in the church.”

The usual proceedings have been had,—and the articles containing the circumstances of the charge stand for admission.

The two first articles plead the law upon the subject,—the canons and the statute.

The law directs that a clergyman is not to diminish in any respect, or to add to the prescribed form of worship;—uniformity in this respect, is one of the leading and distinguishing principles of the


Church of England,—nothing is left to the discretion and fancy of the individual. If every minister were to alter, omit, or add according to his own taste, this uniformity would soon be destroyed, and though the alteration might begin with little things, yet it would soon extend itself to more important changes in the public worship of the Established Church, and even in the Scriptures themselves;—the most important passages might be materially altered, under the notion of giving a more correct version,—or omitted altogether, as unauthorized interpolations.

The law, also, not merely the statute of Edward VI. but the general ecclesiastical law, protects the sanctity of public worship,—and still more endeavours to prevent every circumstance which may lead to the disturbance of persons engaged in solemn acts of devotion;—it prohibits all quarrelling, chiding, and brawling in the church, or church-yard, and requires decent and orderly behaviour.

The *third article* pleads generally, that the defendant frequently leaves out portions of the Holy Scriptures appointed to be read,—and often acknowledges that he has so done,—and declares that he will do so again.

The *fourth article* pleads a specific instance,—*viz.* “that on the preceding Sunday he omitted part of a verse in the first lesson,” and if the fact had happened simply, (though strictly speaking, not legally justifiable to omit any part,) yet, probably this suit would not have been brought;—but the article proceeds to state, that after he had omitted

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the verse, he looked round to the pew of Francis Newbery, and said, " I have been accused by  
 " some ill-natured neighbour of making altera-  
 " tions in the service ; I have done so now, and  
 " shall do so again, whenever I think it necessary ;  
 " therefore mark."

This gives a very different colour and complexion to the act,—the omission seems to have been made, not from mere feelings of delicacy, which, though not a legal justification, would greatly extenuate the omission ;—but the omission seems to have been selected, as affording a favourable opportunity of asserting the general right, and even of reflecting, in the midst of the service, upon those who questioned the general right.

The violation, therefore, of the law, was aggravated by circumstances which render the correction of the offence necessary and proper.

If this article should be proved, it will not only subject the party to admonition, but further, to the payment of costs.

The *fifth article* pleads, that in publishing in the church a citation for a faculty for appropriating a vault to Francis Newbery, Esq. he declared as follows:—" It appears by this paper, that Mr. New-  
 " bery is endeavouring to obtain a right to this  
 " vault, which he has hitherto used only by suffer-  
 " ance, and thus provide a permanent place of in-  
 " terment for his family and himself. You see,  
 " therefore, that he wishes to be buried amongst  
 " you, though he never attends the sacrament,  
 " and seldom comes to church ;—if you have any  
 " objections to this grant, you will state them to

" the Bishop's Court, which will be held at Lewes  
" on Friday, the 16th inst."

This was not the proper time, nor the proper place, to explain to the parishioners what their rights were, and how they were to proceed if they thought fit to oppose this grant;—much less was it a lawful or justifiable occasion of reflecting upon, chiding, and reproaching the individual applying for the faculty, for never attending the sacrament and seldom coming to church. It would be difficult to put any other construction upon this conduct, than that the opportunity was taken as a mere pretext to give vent to his malevolence, and for the purpose of exciting opposition to the grant;—it amounts to illegal chiding,—to reprehension leading to quarrelling,—and to an attempt to render the church a place of public dispute and confusion. The effect which such conduct, if not corrected, must have upon the minds of the congregation assembled for very different purposes, need not be described.

The *sixth article* pleads, that a poor man near eighty years of age, on approaching the altar to receive the sacrament, was addressed by the minister in the following words :—" Does not your conscience prick you? how can you think of coming to receive the sacrament when you are rich, and have suffered your son to go to the parish for relief."

These articles are certainly proper to be admitted;—whether they can, or cannot be proved, I am not to anticipate;—but if they can, I am of opinion that the conduct of the minister is illegal,

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and will subject him to censure, and to the costs of the proceeding. He therefore will consider well whether he will act discreetly and adviseably in defending the suit.

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(a) The Articles were admitted to proof.

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1811.

(a) An affirmative issue was given by Dr. Goodwin to these charges,—whereupon the Court suspended him from the ministration of his office for a fortnight,—decreed a monition against him to refrain in future from offending in the manner charged in the articles,—and condemned him in costs.

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PECULIARS' COURT OF CANTERBURY.

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SMITH v. HUSON, falsely called SMITH.

July 11.

**A** MARRIAGE took place between Henry Smith and Afra Huson, on the 8th of December, 1805.

The marriage of a minor by licence with the implied consent of the father, established.

On the 17th of April, 1809, Henry Smith instituted proceedings to annul the marriage, on the ground that his wife was a minor at the time it was contracted, and had not the consent of her father.

MARY MESSENGER (the sister of Afra Smith) *deposed*,

“That her sister came to London on the 7th of December, 1805, and, on her return to Croydon, on the following day, she informed the deponent, that she was, on that day, married to Mr. Smith. That they were married by licence, in the parish of Saint George, Hanover-square, and Mr. Pearson and Miss Howse were present, and she signed her name in the book at the church; and that, at the time of the solemnization of the said marriage, the said Afra Huson was a spinster, and a minor of the age of seventeen years and upwards, and under the age of twenty-one years; and she believes such marriage was had and solemnized without the consent of Ralph Huson, the natural and lawful father of the said Afra Huson, the minor aforesaid, or of any other person having, by law, a right to consent

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thereto." And in another part of her deposition, "that during the time the said Henry Smith was in the frequent habit of coming to the house of Ralph Huson, and paying his addresses, in the way of marriage, to the said Afra, Ralph Huson used to speak of him as an industrious good young man; that the deponent has frequently heard her said father say, that he would not oppose any of his daughters' inclinations in point of a husband."

*SARAH HOWSE deposed,*

"That she was on a visit at the house of Ralph Huson, the father of the ministrant, in Oct. 1804; and continued there she thinks about a week or a fortnight; that she does not recollect that Henry Smith came regularly every day to the house of the said Ralph Huson, but he came of an evening sometimes; that she verily believes it was understood by Mr. and Mrs. Huson, and the family, that the said Henry Smith came for the express purpose of courting the aforesaid Afra Huson; that Ralph Huson always received the said Henry Smith, when he came to his house, as one of the family; and as the respondent believes, received him as his intended son-in-law; that the said Henry Smith always shewed very great attention towards the aforesaid Ralph Huson; that she was on a visit at the house of the said Ralph Huson in 1805, and stayed there about a fortnight; that Ralph Huson was then much indisposed by a stroke of the palsy; that he had, in consequence of the said paralytic stroke, lost the use of his right side, but he, occasionally, came down stairs to his meals, and walked about the house with a stick; that the producent was frequently at the

house of the said Ralph Huson during the time that the respondent was there, and sometimes drank tea with the family ; and the said Ralph Huson, at that time, spoke and behaved to the producent in a very kind and friendly manner ; and the respondent verily believes that the said Ralph Huson well knew and understood that the producent came to his house for the sole purpose of paying his addresses, in the way of marriage, to his daughter, and approved thereof."

**DEBORAH HUSON** (the mother of the party, *proceeded against.*)

"That Ralph Huson died on the 24th of June, 1806—that he was very kind and good to his children—and did not sanction any persons coming to the house but those he approved of—that he would not have permitted any young men to visit his daughter, except they came on honorable terms—that he permitted Henry Smith to visit his daughter Afra, as he considered that he intended to marry her—that during the time Henry Smith paid his addresses to their daughter, Ralph Huson used to tell the deponent to treat him with respect, and to look upon him as one of the family, and to make him welcome, come to the house when he would, as he was a very industrious young man, and a very good young man, and he considered him as one of his sons ; and often told his son Henry that he should be glad to see Afra and Smith comfortably settled ; that it would make him very happy ; that Mr. Martin, a master bricklayer at Croyden, frequently came to spend the evening with him, and the deponent recollects her husband asking him if he knew

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Smith, to which Martin said, 'Yes, he did know him very well, and if he sent in a load of bricks at night, he came the next morning for the money ; that he gave no longer credit, for he stood in need of the money ;' that her husband replied, ' Mr. Martin, my daughter Afra and his son have taken a great liking to each other ;' Mr. Martin said, ' Remember, Mr. Huson, there is no money there ;' and Huson said, ' If she likes a chimney-sweeper, my daughter, I wont deprive her of her happiness ; he is a very sober, industrious young man, attentive to business, and might get forward in life as well as those who have more money ;' that she thinks, on the 12th of February, 1805, Ralph Huson was seized with a stroke of the palsy, which deprived him of the use of his right side, and prevented him ever after attending to his business, as he could not even dress himself or cut his victuals ; that his mental capacity continued sound and good, except that, at some times, he would be a little lost for a few minutes ; that, in the month of April following, he came down stairs, and continued to come down every day, and took his meals with the family till about the month of October ; that the said Henry Smith sometimes dined, and very frequently drank tea and supped with the family, and frequently stayed there all night ; that, on such occasions, when the said Ralph Huson saw him with his family, he always shook hands with him, treated him with great respect, was always glad to see him, and told him to make it his home whenever he liked ; and, let who would be there, the said Henry Smith always came into the parlour, as one of the family,

and always behaved very kind to the said Ralph Huson; that, some time about the latter end of September, or beginning of October, 1805, the said Ralph Huson's health began to decay, and he grew weaker; and, from that time to the time of his death, which happened June 24, 1806, the deponent thinks he was never down stairs more than three times, but was confined to his bed-room, and the apothecary ordered him to be kept very still; that Henry Smith was always considered as one of the family; and the deponent thinks he saw Ralph Huson two or three times when he was confined to his bed-room; that, one day, in a conversation with his daughter Mary, he said, 'Mary, I am not unhappy about you, but Afra's rather giddy, I am rather uneasy about her;' to which the said Mary Huson replied, 'Father, don't make yourself uneasy, for Henry Smith and Afra either is married, or soon will be;' and the said Ralph Huson put his two hands together, and said, 'Thank God! Mary, you have made me quite happy;' that she first became informed in July, 1806, that Afra was married to Mr. Smith, and was informed thereof by her said daughter; that she did not know of the intended marriage before it took place, further than that the said Henry Smith paid his addresses to the said Afra Huson, and that she expected that it would take place when he got into business; that she was not informed by any one that it would take place when it did; that she does not know that her husband was acquainted by any person that such marriage was proposed or intended at the time it took place, and she does not know whether he did or did

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not at any time prior to the said marriage, declare his consent thereto, but he always expressed a very great wish for them to be married, for he wished to see them settled and happy; that he did not make, or direct to be made, any preparations for the said marriage; that when the said Afra came to town, she told the respondent, that she was going up to spend the day with Miss Howse,—it was Miss Howse's birth-day; that neither the respondent, or her said husband, then knew or believed, that such visit was a mere colourable pretence, and that, in reality, their said daughter was going to London to be married; that neither she nor her husband attended the wedding, because they did not know of it, neither was her husband able to attend it; that neither her husband, nor herself, did, during her husband's lifetime, ever mention to any one that their daughter Afra was married; that neither her husband, or herself, or any one else, ever called her said daughter Afra by the name of Smith during her father's life, to the respondent's knowledge; that, when she was informed Mr. Smith had married her daughter Afra, she expressed her pleasure thereat, and wished her all the happiness the world could afford her; that she approved thereof."

WILLIAM GENTRY *deposed*,

"That Ralph Huson frequently spoke to him on the subject of his family, and the disposal of his effects, and appointed him one of his executors; that the deponent was in the same habits of friendship with the said Ralph Huson during his last illness, which continued for some months, as he had been for a great many years; that he does not re-

collect that the said Ralph Huson ever said or hinted to him, that he either knew or suspected that his daughter Afra was courted by the said Henry Smith, or that she received his visits, or that she was likely to be married to him ; that the deponent has often seen the said Henry Smith at the house of Ralph Huson, and knew that he visited him ; but the deponent does not know, and has no reason to believe, whether he was received by the said Ralph Huson as or upon the footing of a man likely to become his son-in-law, by marrying his daughter."

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The same witness answered to an interrogatory, "that he does not know whether Henry Smith came very often to the house of the said Ralph Huson, but he has seen him of a Sunday afternoon and evening, when he has been there ; that it is impossible that he can tell the ideas of the father and mother of the visits of Mr. Smith to the family ; that when he has seen Henry Smith there, he has seen the same attention paid to him as to the visitors who were there at the same time ; that the respondent believed that he was paying his addresses in the way of marriage, to his present wife ; but he does not know what other people understood of it."

*Stoddart and Jenner, for Mr. Smith.*

*Swabey and Burnaby, contra.*

JUDGMENT.

SIR JOHN NICHOLL.

This suit is instituted by Henry Smith, to have his marriage with Afra Huson declared null.

The marriage was solemnized by licence on the 8th of December, 1805,—and the fact of the marriage is admitted and proved,—the birth and baptism of Afra Smith are sufficiently established to

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have taken place in the course of November, 1788,—so that she was little more than seventeen years of age at the time of her marriage,—her father was living,—and the only question is, whether the marriage was had with or without the consent of her father?—for the marriage act (a) expressly declares, “*that all marriages solemnized by licence, where either of the parties (not being a widow or a widower) shall be under the age of twenty-one years, which shall be had without the consent of the father of the party so under age, if then living, first had and obtained, shall be absolutely null and void.*”

The party who prays the sentence of nullity must prove the fact of the marriage having been had without the consent of the father,—the presumption of law is in favour of the marriage,—*semper præsumitur pro matrimonio*.—Where a marriage has been solemnized, the law strongly presumes that all the legal requisites have been complied with.—This presumption is not less favorable where there is no particular disparity in the age or situation of the parties,—where the marriage has not been hastily entered into,—where there is no appearance of either of the parties having been surprised or inveigled into the contract, and consequently where the object and policy of the statute cannot have been violated.

In the present case the man was about twenty-two or twenty-three years of age, and was shopman to a grocer at Croydon. The woman was the daughter of a plumber and glazier in the same town. A courtship of near a twelvemonth is

(a) 26 Geo. II. c. 33.



proved,—she went to London by appointment with him to be married,—the licence was obtained by the man four days before the marriage:—so that there was no disparity of age or condition between the contracting parties, nor any haste in the act.

The favourable presumption is still further fortified, by this suit not having been brought by the woman who was a minor, and incompetent to contract a marriage, but by the husband, who was of full age,—who was fully competent to bind himself, and who prevailed on this young girl, almost a child, to come to town to be married privately,—certainly without the presence of her father,—probably without his immediate knowledge of the marriage,—under the pretext of keeping the act secret from his own friends, till he had sufficiently established himself in business to be independent,—not only so, but he obtains the licence on his oath, as it should seem, (for he could not be ignorant that this young girl was a minor,) by wilful perjury,—for, instead of obtaining the consent of her father, he swears that she was of age.

The circumstance of his wishing to conceal the marriage from his own friends, coupled with the infirm state of health of the father, who was then become paralytic, sufficiently accounts for the mode in which the licence was obtained, without raising the ordinary inference, in any forcible degree, that the consent of the father could not be obtained.

The husband then comes into court, laying the foundation of the case in his own corrupt act, the licence being obtained by perjury, not to conceal the fact from the father of the minor, but from his

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own friends.—The presumption, therefore, in favour of the marriage, and the burthen of proof thrown on the party instituting the suit are unusually strong.—Indeed, I have rather understood, that the Superior Court did, on one occasion, express something of surprise that suits of this description should be allowed to be instituted at the prayer of the party who had obtained the licence,—but however revolting this may be at first sight, yet upon consideration that the act of Parliament makes the marriage void, notwithstanding these unfavourable circumstances,—as third parties may be interested in the declaratory sentence,—and as the public also may be concerned that the state and condition of the parties should be judicially ascertained,—these suits have been suffered to proceed.—Such circumstances, however, are not wholly immaterial in considering the force of legal presumptions, and the weight of the burthen of proof.

Under these considerations, the Court is to enquire whether the party has established, that this marriage was solemnized without the consent of the father first had and obtained,—for that must be established by the party setting up the nullity,—the other party is not bound to prove consent,—consent is presumed till the contrary is shewn.

In construing this statute, it has not been held that an express and direct consent is necessary to the very fact of marriage at that particular time and place. The case of *Selby v. Selby* (a), sufficiently established that point, for all that the mother said

(a) Consistory Court of London, 1771.

was, that her daughter asked her consent to marry Selby,—and she gave her consent, and wished them happy;—but it was not pretended that she knew when or where they were to be married—they were not married for a month afterwards;—and the licence was obtained by the oath of the man, swearing that the woman was of age.

I also understand that the present Judge of the Consistory (and whatever falls from him is of great weight) confirmed this doctrine, stating that consent to the marriage itself at a particular time and place was not necessary;—but that a general consent to the marriage was sufficient.

The next consideration is, how that general consent must be given,—must it be expressly in words,—or is it sufficient to be given impliedly by conduct,—or lastly, where it is strongly given by implied conduct, whether it must not be presumed to have been also expressly given by words, unless that presumption be most decidedly and clearly negatived. All that the act says, is that the marriage will not be valid *without the consent first had and obtained*;—but the sort of consent necessary, whether express or implied,—whether by direct words,—or whether by implied conduct,—is left perfectly open so far as the terms of the act go,—and the Courts have gone almost the length of requiring proof of dissent where the person whose consent was necessary had any knowledge of the courtship.

In *Stoney v. Terry (a)*, the father had encouraged

(a) *Stoney v. Terry*, Consistory Court of London, 1771.

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the man to come to the house,—there was no proof of consent,—the licence was obtained on an oath that the party was of age,—which raised an inference of want of consent to the marriage itself;—but the father was dead, and could not negative consent; and there being no proof of dissent,—the marriage was held not to be invalid.

In *Osborn v. Goldham (a)*, the mother acquiesced,

(a) *Osborn v. Goldham*, Consistory Court of London, Aug. 2, 1808. Arches' Court of Canterbury, Dec. 12, 1808. The suit was instituted by the wife against the husband in 1807. She was stated to have been born in Brydges-street, on the 25th of February, 1774, and to have been baptized on the 17th of March following:—the marriage took place in 1795. The following is an extract from Sir William Wynne's judgment in the Court of Arches. "The proof of her birth rests on the evidence of Anne Owen. An entry in the books of one of the lying-in-hospitals describes her mother to have been delivered in Brydges-street, of a male child;—the midwife who had been employed seven years in the hospital, recollects that she did deliver a woman in Brydges-street, about this time, of a girl;—it is stated, that the registers of the hospital are very irregularly kept;—this is the only evidence of the birth;—with respect to the baptism, little can be depended on.

"The marriage was in 1795; the mother is said to be the wife of a second husband, and, consequently, that she had no right to give her consent. It appears, however, that the mother's second marriage could not have been a lawful marriage, as the banns were published under a wrong name; she was, therefore, unmarried at the time.

"These parties have been living together thirteen years, from the time their marriage was first communicated to the mother;—at first hearing of the event, she expressed surprise, but not dissatisfaction;—she died in her daughter's house;—this must be esteemed a complete acquiescence on the part of the mother.

"The statement then that this marriage was had without the

—after the marriage there was no proof of dissent,—the woman was a minor, but the licence was obtained on oath of the husband stating that she was of full age,—consent was presumed, and the marriage held not to be invalid.

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Where the courtship has been known and not prohibited,—and à fortiori, where it has been countenanced and encouraged, the law must and ought to presume that the party was consentient, and had given that sort of consent which the law requires. —Such conduct is equivalent to saying, “Get your marriage solemnized whenever you please, I have no objection, I consent.”

If more direct consent to the fact were required, and no evidence could be obtained of the negative from the person whose consent was necessary, he being dead, as in this case, the Court would be justified in presuming that such a consent had been

consent of the mother is not proved ;—it is not necessary that the mother should have appeared when the affidavit was made, and have given her consent.

“The case of *Selby v. Selby*, in the Consistory, 1771, was on the same ground. A suit was brought for a nullity, the mother was proved to have signified pleasure after the marriage, and the marriage was confirmed.

“In the present case, the acquiescence was immediately after the marriage,—it continued thirteen years,—nothing was done during that time. It certainly was not the intent and meaning of the act to annul a marriage of this kind,—the object of it was to prevent minors from being drawn in without the consent of their parents ;—the suit here was not brought till after the death of the mother ; the evidence does not bring it within the act of parliament ;—the proof is defective ;—and I shall pronounce against the appeal.”

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obtained as the law required, notwithstanding that the matter had been kept secret.

Let me not be misunderstood on this part of the question. I do not mean to lay down that implied, or even express consent to a matrimonial connexion may not be retracted, or may not be limited ;—a parent may countenance and encourage a courtship,—may give an express consent to marriage,—or he may limit his permission to courtship, by stating that before he gives his consent to the marriage itself, he must further deliberate ;—that settlements must be made,—that other circumstances must take place before he gives his final consent ;—but if courtship allowed, and encouraged without retraction, and without limitation and restriction, implies a consent to the matrimonial connection, in such circumstances it will not be a marriage without consent first had and obtained,—and this is the point which must be kept steadily in sight, as necessary to be proved.

If these principles are correct, the evidence in this case leaves me little difficulty in deciding it.

The father died in June 1806, six months after the marriage,—his direct evidence, therefore, cannot be obtained ;—but there is no direct proof of want of consent. The mother,—brother,—sister, and the sister's husband, and several others, have been examined,—they all prove that the man visited openly in the family, and was received by them as the acknowledged and accepted lover of the woman,—that he spent the evenings with them, particularly on the Sundays. He has pleaded that his

meetings with her were secret,—that he was not received at the house as her lover, but that he only went there clandestinely;—these facts are totally unsustained by proof,—that his visits were countenanced and encouraged, is proved by his own witnesses,—by Sarah Howse, to the fullest extent,—and even Mr. Gentry says that he often saw Smith there on the Sunday.

It has been said that another person, Mr. Shove, was received as a favoured lover at the house after the summer of 1804;—but this is sufficiently negatived.—There is some doubt upon the evidence whether he ever paid his addresses to her at all, but if he did, he had been rejected, and was not received by her in the light of a lover.—With respect to Mrs. Huson's declarations, on Shove's marriage,—the account of it is so blind,—and it is given by two persons who say they accidentally overheard the conversation, and not by the persons with whom the conversation was held, that it is impossible to rely upon it, or safely to draw any inference from it;—the mother herself positively denies it.—Even admitting that the declarations were made by her, it is impossible that they could have been serious or sincere, as at the time she is stated to have made them she very well knew that her daughter was married to Smith. Her evidence on the other hand is strong to shew that Smith paid his addresses to her daughter, and that he was received by her husband and herself as one of the family; her words are, "*that her husband and herself approved of Henry Smith paying his addresses to their daughter, and expected that he would marry her.*" In other

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parts of her deposition she says, "that her husband
" used to treat him with respect,—to look upon
" him as one of the family,—to make him welcome
" to the house, come when he would, as he was a
" very industrious young man, and that he often
" told his son Henry, that he should be glad to see
" Afra and Smith comfortably settled, and that it
" would make him very happy, that she recollects
" his saying to a person of the name of Martin,
" Mr. Martin, my daughter Afra and Henry Smith
" have taken a great fancy to each other. Martin
" replied, remember, Mr. Huson, there is no money
" there. He answered, if she likes a chimney
" sweeper, I wont deprive her of her happiness ;—
" he is a very sober industrious young man, atten-
" tive to business, and would get forward in life as
" well as those who have more money."

The father had a paralytic stroke in 1805, but he continued to treat Smith with the same kindness ; her mother mentions a conversation between the father and his eldest daughter ; not long before his death he said, " Mary, I am not unhappy
" about you, but Afra is rather giddy, I am rather
" uneasy about her ; to which she replied, father,
" dont make yourself uneasy, for Henry Smith and
" Afra either are married, or soon will be ; and her
" father put his hands together and said, thank
" God, Mary, you have made me quite happy."

The daughter, Mrs. Messenger, confirms this declaration.

Now, though it may be inferred from hence that the father did not know that the marriage had taken place, yet it strongly implies his approbation

of it, and that his approbation had never been withdrawn. And where there was previous knowledge and approbation of the courtship, and no appearance of retractation, consent to the marriage is to be presumed. The father had become paralytic, which usually affects the memory; it is not impossible that he may have signified his assent to the marriage, and may even have known of its having taken place, and yet have forgotten these circumstances,—this is not impossible;—but I go no further:—perhaps the probability is the other way;—but the legal presumption is that Smith did obtain the father's consent, as far as the law requires,—and there is no proof of dissent,—nor any clear proof of the want of consent,—as if it had been shewn that the parent was wholly ignorant of the courtship, as in the cases of *Balfour v. Carpenter* (a) and *Jeffries v. Foster* (b).

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Mrs. Messenger, the sister of the wife, has been examined, and fully confirms her mother's account.

Mr. Huson also, the brother, *deposes*,

That “ in the frequent conversations he had
“ with his father and mother, they fully expected
“ such marriage to take place;—that while Henry
“ Smith was paying his addresses to his sister, he
“ has often heard his father say that he thought
“ Mr. Smith was a good and industrious young
“ man, and that by his care and industry he had
“ no doubt but that he would be as well off in
“ the world as others, and would make Afra a

(a) *Balfour v. Carpenter*, Arches' Court of Canterbury, Michaelmas Term 1810. See p. 204.

(b) *Jeffries v. Foster*, Consistory Court of London, T. T. 1811.

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"good husband, and that he had rather she should
"have Mr. Smith than a man who was richer, on
"account of his care and attention."

Surely this is consent, if it is not afterwards
retracted?

The visiting and reception of Mr. Smith in the family is further confirmed by several other witnesses; and although the particular declarations to which I have alluded come from witnesses who may be biassed from their connection with Mr. Smith, yet I see no sufficient grounds to disbelieve their testimony;—that, however, which confirms them most strongly is the *evidentia rei*. Smith admits that he courted her,—he admits that he prevailed upon her to marry him,—why should he keep his attachment secret from the family? or why should they withhold their consent, since from his age, character, and situation, the match was not an improper one; and if the conduct and character of the young woman are to be judged of from the letters which are before the Court, she was well worthy of his choice, and has deserved better treatment at his hands than she has experienced.

The conduct of the father, and his declarations respecting this marriage, are sufficiently established,—the presumption of law is so far from being repelled, that it is most strongly confirmed by them. So far from its being proved to have been a marriage without the father's consent, there is every reason to conclude that he was fully consenting to it, either expressly on an application made by Mr. Smith, or impliedly by his conduct in

such a manner that the law will construe and presume, (and this is all the Court has to decide,) that the marriage was not had without consent.

Upon the whole, I must pronounce that Mr. Smith has failed to prove his libel,—and that the wife is entitled to be dismissed from all further observance of justice.

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HIGH COURT OF DELEGATES.

Delegates,
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An Appeal from the Peculiars' Court of Canterbury.

June 24, 25,
and July 6.

The Judges' Delegates who sate under this Commission of Appeal were

Mr. Baron Wood,
 Mr. Justice BAYLEY,
 Doctor ARNOLD,
 Doctor ADAMS,
 Doctor DAUBENY,
 Doctor EDWARDS.
 and
 Doctor DODSON.

The marriage
 of a minor by
 licence with
 the implied
 consent of the
 father, estab-
 lished.

Mr. Leach, Dr. Swabey, Dr. Burnaby, and Mr. Yorke, in support of the marriage.

The presumptions are always in favour of marriage;—in the present case, every circumstance is unfavourable to the party endeavouring to set aside the marriage,—there is no disparity in the age or situation of the parties,—the licence was obtained upon the oath of the husband, which was wilfully false in two points,—of this perjury he

comes to take advantage,—the suit moreover is not brought by the party whose consent is required,—and it is not brought till after the death of that party. All the act enjoins is, that the marriage should not be clandestine, and therefore that it should be with the approbation of the parents,—a general approbation therefore is held to be sufficient, even though the father should be ignorant of the time and place of the marriage;—the Court then is to see whether it has proof that consent was not given,—circumstances are the constant interpreters of this act, it decidedly is not necessary that consent should be given at the particular time and place of the marriage;—but a general consent is necessary;—we admit also, that it must be previous consent, but we contend that if given long before, it is sufficient, provided it has not been retracted. Consent may be expressed directly,—or like any other fact, it may be proved by indirect evidence, such as that of the father's knowing of the addresses paid to his daughter, and approving of them.

In the earlier cases, the courts have gone almost so far as to require proof of the dissent, where the father has been dead;—and where he has been living, they have held all evidence of dissent insufficient in cases where the father has not been produced and examined as a witness.

In *Heslop v. Haddon* (a), the Court, after publication, allowed an allegation to be given in, and affidavits to be exhibited, shewing the consent of the mother.

(a) *Heslop v. Haddon*, 1788.

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In *Stoney v. Terry* (a), the father was dead, but it was shewn that he had encouraged the suitor,—and the Court held that there was no evidence to shew that consent was wanting.

In *Selby v. Selby* (b), the mother was examined.

In *Hodgkinson v. Wilkie* (c), it was held that consent once given will continue.

From the strong circumstances of this case, the Court will presume consent—the suit was not brought till the death of the father.—The mother, brother, sisters, and sister's husband, all prove the footing on which Mr. Smith was received in the family anterior to the marriage,—and there is nothing to shew that the father would not have approved of the marriage at any time.

The appellant calls upon the Court to release him from a most important contract,—he must shew a clear title,—this he has failed in doing,—he has disproved his own case, and the Court must pronounce in favour of the marriage.

Mr. Fonblanque, Dr. Stoddart, Dr. Jenner, Mr. Holroyd, and Mr. Brougham, contra.

The Court is called upon to consider the construction of a statute, and not the character of the appellant. Consent to addresses cannot be held to be consent to marriage,—addresses are frequently broken off upon pecuniary considerations, to which it may be the duty of a parent to attend.—Besides, what is the sort of marriage to which the Court is called upon to presume that the father had con-

(a) *Stoney v. Terry*, Consistory Court of London, 1771.

(b) *Selby v. Selby*, Consistory Court of London, 1771.

(c) *Hodgkinson v. Wilkie*, Consistory Court of London, 1796.

sented in the present instance? that his daughter was to retain her maiden name, and being placed in a situation in which she might have a child, she was nevertheless to pass as a spinster.

This is the first case of this description, which has been brought before this Court; the man might have denied the marriage in an action for goods sold and delivered; and the child might be put to prove his legitimacy;—with respect to the facts,—it is clear there was no consent or knowledge on the part of the father.

Mr. Justice Bailey.

I take the fact at issue between you to be, that they admit that there was no knowledge of the marriage or consent at the time; but they contend that there was that conduct which amounted to a previous consent.

Argument resumed.

We apprehend that the facts proved completely negative any antecedent consent,—reliance has been placed on the addresses being known to the father; but by law, a child is rendered incapable of contracting a marriage, except with the consent prescribed in the statute. The father would act contrary to his duty if he consented to marriage when he consented to addresses;—in the latter instance, it was his duty to interpose all vigilance that his confidence should not be abused,—to see that the visits, though permitted, were not abused;—it is not till his daughter's affections are engaged, that he can stipulate for a provision for her,—it is then that firmness is required from the father,—if a man can say to him, because I have had your con-

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sent to my addresses, therefore I have your consent to my marriage, and accordingly I have married your daughter, I have anticipated any stipulations you might have to make for a provision for her, if it were lawful to consider addresses in this light, it would be at once to repeal the marriage act, and to throw open again the Fleet and Marshalsea. How could a father, under such doctrine, admit any man to pay his addresses to his daughter?

No case has been cited in point; if there have been any, they have not been appealed;—it is of great importance to the public, on account of the principle on which the decision must rest,—because it will be to guide future cases, and if it shall be established to the extent contended for, it must introduce great uncertainty and confusion into the law;—the object of the act is to obviate the mischiefs resulting from clandestine marriages,—it is not to be construed strictly as a penal, but from its fair import as a remedial act.

In *Horner v. Liddiard (a)*, though the words of

(a) Consistory Court of London, Easter Term, 1799. “*First*, The marriage of minors is to be had with the consent of the father. Of what father? I take it clearly to mean of the legitimate father, and him only; for it follows, *secondly*, the consent of a guardian lawfully appointed. But how appointed? I pronounce by the father under the act of parliament which gives him the power; for there are only two modes of appointment known to the laws of this country; by the father under the statute, and by the Lord Chancellor. How the guardian appointed by the Court of Chancery is not introduced till a later stage, where he is particularly described; consequently, the guardian here spoken of, must be the guardian appointed by the father; and the father who is mentioned, must be he who

the act extended to the father and mother generally, yet the meaning was confined to those who were so considered in law.

Priestley v. Hughes (a) was on the same principle;—that Courts should leave as little uncertainty in the law as possible,—there are cases which shew how courts of common law have held the marriage act to be construed.

In the *King v. Preston* (b), Lord Mansfield took the distinction between acts made against one party and acts made against both, he understood it as an act not giving the rights of marriage to either party, unless all should be done which the act requires;—as an act to preserve the rights of parents,—consent is rendered indispensable, which shall be previous.

It is not stated by witnesses in this case, that consent was prior to marriage, and the circumstances in proof shew that it must have been subsequent;—it is not contended that it is necessary to

can appoint a guardian : but it is admitted that that power belongs only to the lawful father. The father, therefore, spoken of must be that father, and that father only. In the *third* place, the consent of the mother. If the natural mother is to be understood, she would have more authority than a legal mother, because the right of giving consent does not devolve upon the legal mother till in the third instance, *viz.* in case of a defect of appointment of a guardian by the father. But the natural mother would be entitled to give a valid consent in the second instance, as the natural father can appoint no guardian." See the judgment of Sir W. Scott, in Dr. Croke's report of the case of *Horner v. Liddiard*, p. 180.

(a) 11 East. 1.

(b) Burrows 486. 1 Blackstone, 192.

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prove consent by a party present and hearing that consent given, for all the persons present might die; but if circumstantial evidence is relied upon to prove that consent, it must be such as it will satisfy a reasonable mind that it was given. The father might permit the addresses in the hope that the young man would get forward in the world;—but if consent to addresses is sufficient, the man would immediately obtain a marriage which would be irrevocable.

The cases cited on the other side are very distinguishable from this. In *Stoney v Terry*, there was evidence to shew that the father encouraged the man to come to the house, but there were no circumstances to shew no consent to the marriage as there are here.

In *Selby v. Selby* positive consent was given, though the marriage was not solemnized immediately afterwards.

If the father's consent had been given in this case, what would have been the natural conduct of the parties? No reason is given for concealment, except as against the friends of Smith;—it is not to be presumed that Smith would commit perjury without necessity; the question does not differ here, because the suit has been instituted by the husband; it must rest on the same ground as if brought on by the woman's father.

In *Walker v. Walker (a)*, there was strong presumptive evidence against consent, viz.—perjury—and a false description;—the transaction also was kept secret from the father and mother.

(a) *Walker v. Walker*, Consistory, Easter Term, 1812.

The King v. Thomas Morton (a), a case on an indictment for bigamy,—the first marriage was by licence,—the husband was under age,—it was contended that it must be shewn that the marriage was had with the consent of his father. The Judges doubted;—they thought that the prisoner must prove the irregularity of the marriage, and that consent was to be presumed, unless the contrary was shewn: but the fifteenth section (b) requiring it to be mentioned in the register, which it was not; Wilson, Justice said, the register showed the marriage to be irregular, and directed the Jury to acquit.

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*Mr. Justice Bailey.*

There has been a case since, in which the point was saved;—and the Judges held that a prosecutor must prove the first marriage valid (c).

*Argument resumed.*

The marriage act is to be construed upon its fair import, and it should be the endeavour of courts to carry into effect its object, which is to establish the rights of parents by ascertaining their consent, and great mischief will arise, if consent is easily presumed,—here the presumption is against consent, and the defendant is bound to satisfy the Court that it was given to the actual marriage,—the declaration of the father can be of no avail, unless it is shewn to have been prior to marriage;

(a) *The King v. Thomas Morton*, at Newcastle on the Northern Circuit, April 1789.

(b) 26 Geo. 2. c. 33. s. 15.

(c) *K. B. Michaelmas Term*, 1803.

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—if the marriage was invalid, when it was contracted, the Court cannot now pronounce for it.

*Mr. Leach and Dr. Swabey, in reply.*

It has been argued, that the marriage is void, because it has been had without consent;—but want of consent is what the adverse party has taken upon himself to prove,—the *onus probandi* lies upon him;—the presumption being in favour of the marriage, we do not ask the Court to pronounce the marriage to be good, but to declare that the husband has not proved that it was had without the father's consent;—he has not brought proof on which the Court is obliged to pronounce that the marriage is void.

The cases of bigamy which have been cited, are upon a different issue, and the proof of marriage in them must be *strictissimi juris*.

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Dec. 11. The Judges having maturely deliberated, affirmed the sentence of the Court of Arches.

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## PREROGATIVE COURT OF CANTERBURY.

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NEWHAM v. RAITHBY.

July 28.

**O**BJECTION was taken to an article in an allegation which pleaded the copy of a register of a Dissenting chapel.

Copies of the register of a Dissenting chapel not to be pleaded as evidence.

JUDGMENT.

Sir JOHN NICHOLL.

This is not evidence that can be admitted. The Court can only admit *copies* of public documents which are in official custody.

Extracts from a register of this description must be considered as mere private memoranda:—the books themselves, however, may be produced at the hearing of the cause, and be made evidence to a certain extent: by this means the party will have the benefit of them, though in a different manner from that in which they have now been attempted to be introduced.

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Term.

# ARCHES COURT OF CANTERBURY.

Nov. 8.

PETTMAN by his Guardian v. BRIDGER.

A possessory  
right in a pew  
is sufficient to  
maintain a  
suit against a  
mole dis-  
turber.

**THIS** was a question concerning the right to a pew in the parish church of Eastry, in the county of Kent.

A libel was given in on the behalf of Thomas Pettman, a minor, stating that his grandfather, Thomas Pettman, was for many years before, and down to the time of his death, possessed of lands in the parish of Eastry,—occupied a house,—and was a parishioner there, and as such was entitled to a pew in the church;—that in the year 1789 alterations were made in the church, by erecting new pews, and dividing others, in order that the parishioners who had not any fixed seat, might be accommodated according to the size of their families;—and that livery servants might have a seat apart to themselves;—that Thomas Pettman being one of the churchwardens for that year, and having no fixed seat for himself and his family, was by and with the advice and concurrence of his colleague in office, and with the consent of the parishioners assembled in vestry, put in possession of the pew in question, next to the pew occupied by Mr. Bridger;—and that he continued in the occupa-

tion of that pew till his death, which happened in August 1808.

That upon the death of Thomas Pettman, William his son became possessed of his property, who put his son, the party proceeding in this cause, into possession of the dwelling-house and lands occupied by his grandfather, in the parish of Eastry;—that from that time he also possessed the pew, and continued to occupy it till the 9th of October last (a), when he was disturbed in his sitting therein, and totally excluded from the pew by William Bridger, who took possession of it, and placed his livery servants in it.

That on account of the disturbance thus created by William Bridger, a vestry was held on the 28th of October, when the parishioners then assembled, having given Mr. Bridger a fair hearing, resolved, by a majority of ten votes to two, that William Bridger was not entitled to the seat;—and that Thomas Pettman should keep possession of it: and they directed the churchwardens to place a lock upon the door of the pew, and to give the key to Thomas Pettman;—but that William Bridger, on the Sunday following, caused the lock to be taken off, and again placed his servants in the pew.

Under this statement of facts, the libel prayed the Court to monish William Bridger to refrain for the future from molesting Thomas Pettman in the quiet and peaceable possession of the pew.

In reply to this libel, an allegation was given in by Mr. Bridger, pleading;—

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That in the year 1805, he intermarried with the daughter of Robert Tournay Bargrave, Esq. the lessee under the dean and chapter of Canterbury, of the estate and mansion-house called Eastry Court, and from that time has occupied and possessed the said estate and mansion house.

That the ancestors of Robert Tournay Bargrave held the estate and mansion-house of Eastry Court upwards of 150 years, and during that period constantly occupied two pews as appertaining to the mansion-house, for the use of themselves, their servants, and tenants, to wit, the pew which is the subject of the present suit, and the one next adjoining to it; that during the said time, the family used one of the pews, and their servants and tenants the other;—that the said two pews have from time immemorial appertained to the mansion, and have been reputed and considered to belong to it by the parishioners of Eastry.

That in the year 1784, Isaac Bridger, the then possessor of the estate, granted a lease to Thomas Pettman (the grandfather of the party in the suit) for twenty-one years, and that in consequence of this, Thomas Pettman did, as tenant to Mr. Bargrave, apply to him, and obtained permission to sit with his family in the pew in question.

That in the year 1790 the said Isaac Bargrave caused both the pews to be repaired at his own expence, and fitted up with new linings and cushions differently from the other pews in the church; and that Thomas Pettman being by trade a carpenter, was employed to refit and new line them, and was paid by Mr. Bargrave for so doing.



That in the latter end of the year 1791, Isaac Bargrave caused the two pews to be further repaired and refitted, by new carpetting the same.

That the alterations made in the church in 1789 did not apply to, or include the pew in question, which had not become vacant, but was possessed and occupied by the said Isaac Bargrave, in the same manner that it had been for more than a century before by his ancestors and family;—that Thomas Pettman only sate in the pew as tenant of the Eastry estate, and though he continued to sit there after the expiration of his lease, (in 1805,) it was only by the sufferance successively of Robert Tournay Bargrave and William Bridger, who in consideration of his being an infirm old man, afflicted with a paralytic stroke, were unwilling to remove him.

That on the death of Thomas Pettman in August 1808, Mr. Bridger intimated to his family that none of them would be permitted to use the pew; notwithstanding which the party in this cause, and his father, intruded themselves into the pew: whereupon William Bridger on the 19th of October, 1808, sent his servants to keep possession of the pew; but, in the assertion of his right, he carefully avoided to give any interruption to divine service.

Many witnesses were examined, who proved most of the principal facts put in plea on the one side and the other;—there was no evidence, however, to shew that any repairs had been done to the pew by any of the Bargrave family, except that in the years 1790 and 1791 the pew had been lined and fitted up with new cushions.

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*Swabey and Edwards for Mr. Pettman.*

We stand upon a possessory title, which *prima facie* is sufficient;—i. e. if it has a reasonable commencement, as in the present instance it has, being derived from the churchwardens;—we have peaceable possession for twenty years; to oust this either a faculty must be shewn on the other side, or such an immemorial use as will presume the grant of a faculty.

It has been laid down by every writer, from the first institute to the present day, that no one can found a prescriptive right to a seat from lands;—it must be from a house;—nor can any one prescribe generally for a seat in the body of a church, unless he can shew that his ancestors have time out of mind occupied and repaired the same; prescription too must be strictly pleaded,—which it is not in this plea;—it does not state that he and all those who have preceded him in the occupation in the house have used, or sat in, the pew;—he pleads, indeed, that from time immemorial the seat has appertained to the house, and that he and his family have sat in it for 150 years and upwards; but he does not plead the antecedent use of it, nor who used it before.

COURT.

Is not the immemorial use of it implied in that part of the plea which states that it immemorially belonged to the house in question? Is not that enough in this Court, though perhaps it might not be at common law? Besides, should not you have noticed this objection when the allegation was admitted?

*Argument resumed.*

We apprehend not;—we are not bound to notice a defect in pleading, till the final hearing of the cause;—besides, the party who claims the prescriptive right is bound to shew that the repairs have been made at his expence;—we shew by the belief of persons examined, which, in the case of a prescriptive title, is sufficient evidence that the repairs were not made at his expence; it will be argued that the lining and refitting the seat in 1791 was at the expence of Mr. Bridger, and that we cannot deny our agency on this occasion, our party having been employed as a workman, and sent in a bill for the work done; but this we submit does not constitute repairs in the true meaning of the word;—there is evidence in the depositions of one of the churchwardens, of the seating Mr. Pettman in the pew by the order or consent of the parishioners.

If we prove a possessory right lawfully acquired in which we have been disturbed by a party setting up a prescriptive title, in the proof of which he has failed;—we are entitled to our costs, and the party must be monished to create no further disturbance.

*Arnold and Adams for Mr. Bridger, contra.*

We do not deny the fact of disturbance, but justify it on the ground of the pew having been always appurtenant to the house of which our party is the occupier;—our title, therefore, is in itself an exclusive title, and paramount to all others, and a right which he is bound to maintain.

Nor is there any failure in the plea; it is suffi-

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cient that the plea should substantially set forth the facts on which the party relies;—the strictness of pleading which obtains in the courts of common law, is not called for;—it is the constant doctrine of these courts, that we are not tied down to such a strictness in form as is necessary in other courts; the party pleads the occupation of himself and his family, and of those from whom he holds the estate for 150 years, and then proceeds to state that from time immemorial the pew has appertained to the house he occupied,—he states a right,—and that which was necessary to the right,—that without which a right could not exist,—and then pleads the general reputation that the possession was in him.

We are founded from the evidence in saying that there was a general reputation in the parish that the pew belonged to this house;—the oldest witnesses speak to the history of the pew a considerable time back. It was then in a different form from that in which it is at present; an alteration was made in 1756, and the pews were then put into their present form;—an alteration in the form of the pew could not affect the right. A donation was given to be laid out generally in beautifying the church,—it was taken out of an extra fund,—and as such was applied more to the purposes of ornament than of use or convenience,—if the fact of the alteration of the pew had been proved, it could not affect the right to the occupation of it.

The vestry has no right in the disposal of a pew in the church,—nor was the churchwarden (if the right for which we contend was existing,) entitled

to interpose in respect to it; as little could the Court attend to the general wish and convenience of the parish, if the right of another is involved in the question.

The pew was always occupied by those who lived in the mansion-house in which Mr. Bridger now resides;—his right, therefore, to the pew must have been perfectly known by those who have attempted to dispossess him of the seat, and he is entitled to be seated in it by a decree of this Court, which shall carry the costs against the adverse party.

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit technically termed for “Perturbation of seat,”—it is promoted by Mr. Pettman, who sets up only a possessory right, that his grandfather had the estate and pew for twenty years,—that he succeeded to it, and has been disturbed in the possession of it by Mr. Bridger. Bridger admits the fact of dispossession, but sets up a prescriptive right to the pew.

By the general law, and of common right, all pews belong to the parishioners at large for their use and accommodation; but the distribution of seats among them rests with the ordinary;—the churchwardens are the officers of the ordinary;—they are to place the parishioners according to their rank and station; but they are subject to the controul of the ordinary if any complaint should be made against them.

The vestry, as such, has no authority whatever on the subject;—the churchwardens are not bound

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to follow their directions; at the same time the sense and opinion of the vestry ought to have weight with them.

The general right then being in the parish and the ordinary;—any particular rights in derogation of these are *stricti juris*;—it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish, that the occupation of pews should be altered from time to time, according to circumstances.

A possessory right is not good against the churchwardens and the ordinary,—they may displace, and make new arrangements; but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them;—the possession therefore will have its weight,—the ordinary would give a person in possession *cæteris paribus* the preference over a mere stranger.

A possessory right is sufficient to maintain a suit against a mere disturber;—the fact of possession implies either the actual or virtual authority of those having power to place. The disturber must shew that he has been placed there by this authority,—or must justify his disturbance by shewing a paramount right,—a right paramount to the ordinary itself; namely, a faculty by which the ordinary has parted with the right: or if there be no proof of a faculty,—there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty.

A prescriptive right must be clearly proved,—the facts must not be left equivocal,—and they must be such as are not inconsistent with the general right.

In the *first* place, it is necessary to shew that use and occupation of the seat has been from time immemorial appurtenant to a certain messuage,—not to lands,—the ordinary itself cannot grant a seat appurtenant to lands.

*Secondly*, it must be shewn, that if any acts have been done by the inhabitants of such messuage,—they maintained and upheld the right. At all events, if any repairs have been required within memory,—it must be proved that they have been made at the expence of the party setting up the prescriptive right. The onus and beneficium are supposed to go together,—mere occupancy does not prove the right.—What might be the effect of very long occupancy;—where no repairs have been necessary, I am not called upon now to say;—it is a common error to suppose that by mere occupancy, pews become annexed to particular houses; in country parishes the same families occupy the same pews for a long time; but I apprehend they still belong to the parish at large;—if, however, it is shewn that the inhabitants of a particular house *have repaired*, that fact establishes that the burthen and benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit, and is evidence of the annexation of the pew;—thus the uniform and exclusive possession of the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the

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seat, is evidence sufficient to establish a prescriptive title.

To apply these principles to the present case,—Mr. Pettman sets up no prescriptive right,—his grandfather first sate there in 1789, and continued in the occupation of it till his grandson succeeded him,—this would be no good title against the churchwardens and the ordinary if they thought proper to remove him. It appears that a vestry was held soon after the dispute between the parties in this suit,—at which it was decided by a majority of ten to two votes, that Mr. Pettman was to have possession of the pew, and the churchwardens were directed to put a lock upon it. This is strong against the statement that general reputation was in favour of the right of Mr. Bridger. Mr. Bridger did not bring an action to support his prescriptive right, but on his own authority took off the lock, and resumed possession.

The vote of the vestry is of itself of no authority as to the question of right; but it marks the opinion of the parish, that Mr. Pettman was entitled in opposition to any common intruder.

Mr. Bridger does not set up that Mr. Pettman is an improper person to occupy the seat,—or that the pew is necessary for his own accommodation, (for he has another pew in the church sufficiently large for the occupation of himself and his family,)—the parish is increasing,—and pews are wanted for the use of the parishioners. Mr. Pettman very properly offered to give up this pew to the disposal of the parish;—this proposal was rejected by Mr. Bridger, who stands on his paramount right,—



and the question now is at issue on this right between Mr. Bridger, and the parish at large, as to their accommodation.

Now, though these considerations cannot weigh at all supposing Mr. Bridger can make out his right, yet, still they have some weight in ascertaining the burthen of proof which is imposed upon the parties.

Mr. Bridger pleads, that two pews, the one he sits in, and the one adjoining to it, which is the pew in question, have been time immemorial annexed to his house, Eastry Court. I think, according to the practice of these Courts, the averment is sufficient; it must be considered as including the averment, that the pew had been used,—occupied,—and repaired,—from time immemorial.

The right is put in this shape:—"the two pews appertain to the mansion for the use of the family,—their tenants,—and servants;—the family always sate in one,—the tenants and servants in the other, being the pew in question."

But for the last twenty years, the servants have not sat in the pew;—nor, indeed, have they ever sat in it;—from the time of building this pew, they have occupied a pew in another part of the church.

How stands the case as to tenants? No tenant of the house has sat in it for the last twenty years. Mr. Pettman was tenant of part of the land, but not of the house,—a prescription for a seat as annexed to a messuage, for the use of the tenants of lands belonging to the proprietors of that mes-

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sage,—would be a bad prescription;—it can only be good for the inhabitants of a messuage:—if it could be extended to tenants of the lands,—mere land might be held by the inhabitants of another parish, and the pew would then be for the use of persons not dwelling in the parish, which would be contrary to law.

The pew, therefore, has been occupied for the last twenty years by persons who were not inhabitants of this messuage, and who as mere tenants of lands belonging to the owner of the messuage, could support no personal right; and this fact alone would be nearly, if not quite, conclusive against the right claimed;—it is, however, unnecessary for the Court to decide on this point simply, for the history disclosed in the evidence must be examined,—and in examining it, the Court must keep in mind that the burden of proof rests with Mr. Bridger, and that proof of mere occupancy without maintaining and repairing, is insufficient.

It appears from the evidence of the oldest persons, that this pew was built near sixty years ago; previous to that time, there stood on the site of the two pews, one large pew, and a small slip;—the mansion was then divided into two tenements, with a hall common to both;—the mansion and estate were held under lease, by the Bargrave family, from the see of Canterbury. Mr. Bargrave occupied one tenement of the mansion,—Mr. Sayer the other;—the two families occupied the large pew together,—the servants sat in the open slip.

Now what is there to shew that this large pew

was annexed to the mansion? there is mere occupancy, but no attempt to prove any maintaining or repairing at that time.

Some time between 1750 and 1756 an alteration was made, the large seat and slip were converted into their present form, *i. e.* two seats of nearly equal size;—Mr. Bargrave had one seat,—Mr. Sayer the other,—and the maid servants were placed in a different part of the church. This was a material alteration,—a considerable expence was incurred,—and this, in truth, must be considered as the building of the present seat;—has it been attempted to be proved that this was done at the expence of Mr. Bargrave?—not only the presumption of law, but the strong probability of fact is, that it was done by the parish. Just before the alteration was made, a Mrs. Lawson left a sum of money to the parish to repair and beautify the church. Many alterations were made,—Mr. Bargrave's pew and slip were altered at the same time, and four new pews were made;—they were uniform in appearance, and painted alike.

Now, though it is possible that Mr. Bargrave notwithstanding these circumstances, may have done this at his own expence, yet being done at the same time, and in the same manner, and like the opposite pews, the probability is, that it was all done by the parish.

If this building was done by the parish, there must be a complete end of the question,—it would be a cession of the pew to the parish, unless some express agreement to the contrary could be shewn,—there is no proof that it was done by Mr. Bar-

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grave,—on the contrary, there are several witnesses who say that they believe it was done by the parish, or with Mrs. Lawson's money,—there are none who venture on a contrary belief,—so that the weight of evidence is against Mr. Bargrave, though the burthen of proof lies on him.

The pews have been since repaired ; and the belief of the witnesses is, that the repairing was also done by the parish ;—and it is the more probable, because one or two pews to which the occupiers had an exclusive right, were not painted.

Mr. Sayer was succeeded by Mr. Reynolds, who married his daughter, and who of course continued to occupy the seat ;—in 1782, Mr. Reynolds gave up the house and farm, and quitted the parish ;—another very material circumstance then occurred, —a part of the mansion was pulled down, and the two tenements were united, perhaps restored into one.

In 1784 portions of the lands were let to different tenants, and among the rest, to Pettman ; but so far from this notion that the pew was for the use of the tenants of the lands ;—not one of these tenants at that time sate in it, and Pettman's sitting in the pew neither commenced nor ended with his being such tenant.

It was in 1788 or 1789 that Pettman first sate in the pew ; there was then a general alteration, and new arrangement of the church,—the parish was increasing in inhabitants, and many pews were altered and divided so as to accommodate a greater number of persons. Several of the witnesses state, that it was left to the churchwardens (as properly

it should be) to seat the inhabitants. Mr. Hadden and Mr. Pettman were the churchwardens, and now it was that for the first time Mr. Pettman was put into possession of this pew. Mr. Hadden deposes, and so do others, that he was placed there by the authority of the churchwardens as a matter of right. Mr. Bargrave suggests that it was as matter of sufferance, or as his tenant ;—this suggestion is not very consistent with itself, for if he was entitled as tenant, permission would not have been necessary. I have already said, that as tenant of the land, he could have no right ;—but if Mr. Bargrave had intended to have retained his right, supposing him to have had any, surely, he would have taken care to have recorded in some way that this was mere sufferance ;—that Pettman was only to sit there so long as he continued his tenant ;—or during his pleasure ;—some written acknowledgment from the churchwardens,—some entry in the parish books,—some resolution of vestry, would have been required.

Mr. Bargrave, however, soon after lined, and put cushions into, both pews,—and this is the great fact relied upon to prove repairs, and the only appearance of any ;—I do not consider this as repairs, but as mere ornament ; it proves nothing for this reason, that it is in no degree inconsistent with the fact of the pews belonging to the parish. Lining and cushioning are not usually done by the parish,—these are things which each individual does for his own convenience and comfort. The use Mr. Bargrave made of Pettman's pew is accounted for,—he had occasionally many visitors at his house,

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and when his own pew overflowed, some of them went into his neighbour's pew,—this is an usual accommodation in all churches. Mr. Pettman being his tenant, would of course admit his visitors,—and Mr. Bargrave choosing, as he said, “that his friends should be as well seated as himself,” lined, and put cushions into Pettman's pew, who being his tenant would have no objection to this measure.

But this circumstance, thus accounted for, the only one, and in opposition to all the other facts in the case, does not appear to amount to *repairs*,—to be any act of ownership,—or any proof that the burthen of this pew lay on the owner of Eastry Court, and not on the parish.

Pettman continued in the occupation of the pew till his death, though he ceased to be Bargrave's tenant three years before that event.

It has been said that this was sufferance. Mr. Bargrave might so consider it,—he might suppose that he had the right to the pew. But did Mr. Pettman acknowledge it as sufferance so as in any manner to bind himself, or to deprive the parish of this pew? Quite the reverse. Pettman's family considered that he had the possessory right, and therefore attempted to continue the possession after his death,—and the parish upon hearing the statements, and the whole question, decided by a majority of ten to two that Pettman's notion was right, and that Mr. Bridger was not entitled to the pew.

Upon the whole, I am of opinion that Mr. Bridger has not proved this seat to be legally annexed to his mansion.

Considering also that this right is claimed after a dispossession of twenty years,—that it is a special right set up in derogation of the general principle and policy of the law,—that the pew was not wanted for the accommodation of Mr. Bridger's family,—that it was wanted by the parish—that this right was set up in opposition to the opinion of his fellow parishioners,—that it was enforced by taking off the lock, and placing his livery servants in the pew,—that he refused to accede to any proposals of accommodation that were made to him,—but stood and insisted upon his extreme rights ;—while Mr. Pettman being thus ejected has contested the right, not so much for his own benefit, or for the sake of triumph, as for the accommodation of the parish,—I think the Court is bound to condemn Mr. Bridger in the costs.

In doing this, however, the Court means to throw no imputation on Mr. Bridger's conduct ;—it is probable that he was strongly impressed with an opinion that he had the exclusive right to the pew ;—but having asserted that right, and failed to establish it,—the expence must fall upon him,—and not upon the party who was disturbed in his possession and compelled to resort to the protection of the law.

The Court monishes Mr. Bridger to refrain in future from disturbing Mr. Pettman and his family in the possession of the pew in question, and condemns Mr. Bridger in the costs of the suit.

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## PREROGATIVE COURT OF CANTERBURY.

STRIDE v. COOPER.

The latest in point of date of two wills established, the republication of the first not being proved.

**T**HE deceased was William Dredge, originally a shoemaker, but who in his latter days kept a garden, and sold the produce of it;—he resided in the New Forest, and died there on the 10th of April, 1810, leaving two relations, the one Rebecca Cooper spinster, a second cousin, the other Mary Stride a widow, his first cousin. The former lived with him several years immediately preceding his death, as his housekeeper. The latter was a cripple, and resided at some distance; and on that account, as it appeared from the evidence, was not in the habits of any great intimacy with him; but there was proof sufficient that he entertained a very affectionate regard towards her.

Two wills were before the Court. The one dated Feb. 7, 1801, entirely in the handwriting of the deceased, and attested by three witnesses, in which, after leaving a legacy of 10*l.* to Mary Stride, and his wearing apparel to Robert Cooper, he bequeathed all the rest and residue *of his property to Rebecca Cooper*. This will was found in an envelope with the following endorsement:—



"Wm. Dredge's will, dated Feb. 7, 1801." The paper of this envelope appeared from the water mark to have been made in 1806. The factum of this instrument was not disputed.

The other will bore date on the 8th of July, 1803; by this he gave a legacy of 10*l.* to Rebecca Cooper, 50*l.* to another more distant relation, and the whole of the rest and residue of his property to Mrs. Stride, who was also joint executor with her husband.—The factum of this paper was also most fully proved;—it was not, indeed, in the deceased's own handwriting, for on this occasion he had had recourse to Mr. Strickland, a solicitor, of Fording-bridge, who deposed most fully to the instructions of the deceased, to his execution of them, and his complete capacity; and he was confirmed in his deposition by the other two attesting witnesses.

In the allegation offered in opposition to this latter instrument, neither fraud nor incapacity were suggested;—but the case set up was the revival of the first will in such a manner as to revoke the second, and this by no formal act of republication, but by circumstances taken together, and amounting as it was contended to a republication.

*Swabey and Adams for Mrs. Cooper,*

Contended that the facts proved in the case amounted to a legal republication of the will of Feb. 1801.

*Jenner and Phillimore for Mrs. Stride, contra.*

JUDGMENT.

SIR JOHN NICHOLL.

No formal act of republication is proved; but a collection of circumstances is taken together,

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which have been argued to amount in substance to a republication.

I will not venture to lay down decidedly, that no act short of a direct and formal republication would be sufficient to revive a former, and revoke a latter will, both instruments remaining perfect; but it certainly would require either a second publication, or very unequivocal circumstances. The animus revocandi must be very clearly established, otherwise the last dated will uncanceled must remain in force;—the presumption of law is decidedly in its favour;—it has been pressed upon the Court that slight circumstances will amount to a republication but the authority relied upon for this assertion, by no means bears it out (*a*). Wentworth says, that “if the testator is speechless, his act shall supply the words of republication;” but still a clear act of republication is required, and this is put in an extreme case, and in my mind it goes a great way to shew that there must be some direct and unequivocal act.

In the present case, the circumstances are these:—*first*, an endorsement on the envelope of the will

(*a*) If a man having made a former will, do make a later, which is more than a bare revocation; yet, if afterwards, lying upon his death-bed and speechless, both these wills be delivered into his hand, and he required to deliver to one of his friends about him that will which he would have to stand, and to keep in his hand the other, and he thereupon delivereth to the minister, or other his neighbours, the first made will, retaining in his hand the later, as was done in the time of Edward the Third; here the former will, though made void many years before by the later, is revived, and shall stand as the party's will.—WENTWORTH'S *Office and Duty of Executors*, ch. 1. p. 25.

of 1801,—in these words, “ Wm. Dredge’s will, dated Feb. 7, 1801.” The paper of this envelope is proved from the water mark to have been made in 1806.

This is only pleaded as a recognition ; they do not venture to assert this, of itself, to be a republication. Now this endorsement is perfectly equivocal ;—he had made two wills, one in Feb. 1801, the other in July 1803 ;—this only describes which of the two wills is contained in this envelope, and might be only to distinguish it from other papers. It would not have been inconsistent if he should have made a similar endorsement on the will of 1803.

It is asked why he should preserve this will, and put it in an envelope in 1806 ? It is not necessary that the Court should be able to answer this question ;—wills are ambulatory till the death of the testator,—he had two by him,—he might preserve both, that in case Mrs. Stride should die, or in some other contingency, he might choose to revive this, and destroy or revoke the other, but he has not done it ;—or it might be to deceive Mrs. Cooper, who was living in the house with him, if she should happen to get access to it, and induce a belief in her mind that she was to be the person benefited at his death.

The same observation applies to the next circumstance, *viz.* that he consulted with an attorney, Mr. Woodyear, whether this instrument would be valid ;—but there is no act of republication stated, and he merely took advice as to a particular point ; and the evidence is open to the observation, either that the deceased deceived the witness intentionally,

1811.  
*Trinity*  
*Term.*

STRIDE  
v.  
COOPER.

1811.  
*Trinity*  
*Term.*

STRIDE  
 v.  
 COOPER.

or that the witness must have deposed inaccurately; for the deceased must have known, at least the Court must presume that he knew, that it was not his last will;—he might have had some hesitation in his mind as to which will he should adhere to,—or he might have it in contemplation to set up the first will again, by some future act,—by destroying that of 1803, or upon some event or contingency,—he might also have his reasons for holding out false colours to Mr. Woodyear; at most he was only consulting Mr. Woodyear, and not intending a republication.

This is not sufficient to revoke a later will regularly executed, and attested.

The only remaining circumstance to be considered, is the affection of the deceased for Mrs. Cooper, and his declarations that she would be benefited by his death.

Now circumstances of this kind, though of some weight in an inquiry into the factum of a will, yet weigh nothing as amounting to the revocation of an uncanceled will, the factum of which cannot be impeached.

If, therefore, this evidence had been unopposed, it would have been insufficient to have revoked a latter, and set up a former will;—but there is, on the other side, evidence of a recognition of the will of 1803,—of affection for Mrs. Stride,—of declarations in her favour,—and on the other hand, of disaffection towards Rebecca Cooper, and also of a wish that she should not know how he intended to dispose of his property, which does away the whole effect of the circumstances (in the absence of any formal act of republication) by which it has been

attempted to set up the former and revoke the latter will.

On the whole, the will of 1803 is fully proved; its effect is to revoke the preceding will; and accordingly I pronounce for the will of 1803.

1811.  
*Trinity*  
*Term.*

STRIDE  
v.  
COOPER.

The costs being prayed against the party setting up the will of 1801.

*Per Curiam.* The parties have been misled by the conduct of the deceased; I shall give no costs.

### HOLLWAY v. CLARKE.

*Michaelmas*  
*Term.*  
Nov. 20.

#### JUDGMENT.

SIR JOHN NICHOLL.

Henry Clarke died on the 24th of November, 1810;—he made his will on the 15th of April, 1807, by which he gave his real and personal estates to his executors in trust to sell the whole, and after the payment of his debts, and funeral expences, to apply the remainder to the maintenance and education of his son and two daughters; the whole then to be divided between them with survivorship; but if they all died before twenty-one, or without issue, he then bequeathed over his property to be divided between three cousins.

Marriage and the birth of a child, presumptive revocation of a will made by a widower, and in favour of children of a former marriage.

1811.  
Michaelmas  
Term.



HOLLWAY  
v.

CLARKE.

The deceased was a widower at the time this will was made. He afterwards married, *viz.* in June 1808, and had issue one child, who is now living. He received a marriage portion with his wife; but there was no settlement, or other provision, for her and her issue.

These facts are not controverted; there can be no doubt, therefore, that *prima facie* this will is revoked;—the law is so clear on this point, that it is unnecessary to discuss the history and progress of it; it is sufficient to state that it has been held in a series of cases for upwards of a century that marriage, and the birth of a child, operate as the presumptive revocation of a will; and upon this principle, that there has been such a complete alteration in the deceased's circumstances, such new obligations and duties have been contracted, that a departure of intention must be presumed. The particular circumstance of the deceased's having been a widower, does not seem to break in upon the principle;—the change of circumstances is the new obligation he has contracted by having a new wife, and new issue. Indeed, several cases have occurred in this Court, in which this circumstance has been held to make no difference. In *Emmerson v. Bosville* (a), the testator was a widower, though the particular point made was, whether the subsequent death of the child born in the second marriage, did not set up the will again. The Court held that it did not,—though it was admitted that the presumption against the will would have been rebutted by

(a) See the next case.

circumstances, or declarations indicating an intention that the will should operate,—as was the case in *Thompson* formerly *Myall v. Sheppard and Duffield* (a); but there is no case in which the Court has held a revival from the circumstance of the death of either of the parties in whose favour the law had presumed a revocation.

1811.  
Michaelmas  
Term.  
HOLLWAY  
v.  
CLARKE.

A presumptive revocation may be repelled by circumstances; but then the circumstances to repel must be clear and unequivocal, and shewing that the deceased adhered to, or revived, the will;—there must be some act,—or at least some declaration clearly referring (after the change of circumstances) to the will as an existing will, intended to operate.

In this case, it is stated, that the deceased left real property to the value of 13,000*l.*, and personal property to the amount of 12,000*l.*;—that he left specialty debts to the amount of 8,300*l.* and simple contract debts to the amount of nearly 14,000*l.* making together upwards of 22,000*l.*; so that unless the real estates are charged with the debts, there will be a deficiency of nearly 10,000*l.* in the payment of the debts; and, finally, that the wife will be provided for, by being entitled to her dower.

Now that circumstances of this description are to repel the presumption, I can find no precedent.

It must be shewn by some act or declaration, that he considered the will as an operative will.

The insolvency of his personal estate would, at the utmost, leave the matter to mere conjecture;—he might not be aware of the state of his circum-

(a) *Thompson* formerly *Myall v. Sheppard and Duffield*, Prerog. Trinity Term, 1782.

1811.  
Michaelmas  
Term.



HOLLWAY  
v.  
CLARK.

stances,—he might not have admitted all these demands,—he might not have considered them as urgent, or he might choose that his real estate should not be charged with them; there would be no end of such conjectures in respect to his intention.

The presumptive revocation arising from marriage and issue must be repelled by clear and unequivocal evidence of an intention that the will should operate. The Court, therefore, is of opinion that so far as respects the personalty, (over which alone this Court has jurisdiction,) the will is revoked, and that the deceased died intestate.



1802.  
Hilary  
Term.  
Jan. 22.

EMERSON v. BOVILLE.

Marriage and the birth of a child presumptive of revocation of the will of a widower made prior to a second marriage: and the death of the child does not alter that presumption.

#### JUDGMENT.

Sir WILLIAM WYNNE.

I take it to be established by an uniform course of decisions for above a century, that marriage, and the birth of a child by that marriage, creates a presumptive or implied revocation of a will;—but it is only a presumption grounded on the supposition that so complete a change having happened in the family of the deceased, raises the implication that he did not intend that his will should take effect.



It may be rebutted, as was the case of *Thompson* formerly *Myall v. Sheppard and Duffield* (a); there a seaman made his will in favour of his children by a former wife;—he married again, and had one child, and a posthumous child. Many declarations proved that he did not believe the child, which was born in his lifetime, to have been begotten by him; and there were letters and declarations by which it was completely established that it was his intention that the will should not be revoked; and Dr. Calvert pronounced for the will.

But is there any instance in which there being nothing of this kind, without declarations, or circumstances, importing a permanence of intention, that the presumption has been held to be taken away merely by the death of the child? I think there is no such case, and the effect would be severe, were it to be so held.

For it being established law, that marriage and the birth of a child revokes;—here the wife has no provision.

Finding no case in which it has been held that the death of the child revives the will, I should have been unwilling to hold a doctrine so severe on the second wife, if this had been a new case;—but I find a case in point, that of *Sullivan v. Sullivan* the attorney of *Brooke*. Joseph Derwell made his will March 1771, giving an annuity of 100*l.* to his brother;—several legacies, and the residue to three children, two by his first wife,—and one by his second;—he was then a widower; the

(a) *Thompson* formerly *Myall v. Sheppard and Duffield*, Prerog. Trinity Term, 1782.

1802.  
Hilary  
Term.  
EMERSON  
v.  
BOVILL

1802.  
*Hilary*  
*Term.*  
 ~~~~~  
 EMERSON
 v.
 BOVILLÉ.

will was all in his own handwriting ;—on the 8th of August, 1771, he married ;—on the 1st of May, 1772, a child was born ; on the 11th of the same month the child died ; on the 20th of September, 1772, the testator died, leaving property to the value of 10,000*l.* ;—probate of the will was prayed, which was opposed, and an administration was prayed to his effects as having died intestate ;—two points were made :

1st, That the will was for the benefit of the former children ; and it was argued that in none of the cases decided, was the will in favour of children.

2dly, That the death of the child during the life of the testator, revived the will.

On these points, Sir George Hay said,

1st, That it was as much his duty to provide for a child by his subsequent marriage, as for his other children.

2dly, That he considered that the will would not revive, unless it were republished, or revived by some act. And administration was decreed.

On the authority of that case, and on principle, as I take it,—the death of the child does not revive the will ;—but it requires some act, some recognition, or something to shew the deceased's intention that it should take effect.

I think the will was revoked, and that it remains revoked.

BONE and NEWSAM v. RICHARD SPEAR.

1811.
Michaelmas
Term.
Nov. 29.

WILLIAM SPEAR, of Gray's Inn, an attorney at law, died on the 21st of July, 1811. John Bone and Christopher Newsam alleged themselves to be the executors named in the will of the deceased, as contained in the following testamentary writings marked A. and B.

An informal
will estab-
lished.

(A) *Heads of the Will of William
Spear, of Gray's Inn, Gent.*

- " All my just debts, funeral & testamentary expences to be
" paid immediately after my death : to my uncle
" John Spear five hundred pounds, to be paid within
" 3 months after my death——by my executor ;
" To my brother Charles Spear five hundred pounds ;
" to my BROTHER RICHARD SPEAR (a) one thousand 3p.cents.
" to be set apart in my name in trust (b)
" consol^d. bank ann^y. Δ IN TRUST for my nephew John Spear,
" & my neice Spear, the interest & dividends to be
" sum
" laid out in the funds. Same Δ to accumulate till the eldest
" one moiety of (c)
" attains 21; then Δ to divide the principal & the accumulations
" to be paid him, & the other moiety to remain till my
" neice attains 21; then to be transferred to him; if either
" die before 21, the surv^r. to have the whole at 21 ;
" if both die under 21, to go to my executor ;

(a) The words " to my BROTHER RICHARD SPEAR," were struck through with a pen.

(b) The words " IN TRUST," were struck through with a pen.

(c) The words " to divide," were struck through with a pen.

1811.
Michaelmas
Term.
 BONE and
 NEWSAM
 v.
 SPEAR.

two (a)

" To my brother-in-law John Bone one thousand 4 p.cents.
 " to be set apart in my name in the bank, IN TRUST for the
 of my brother-in-law John Bone,
 " son & daughter, the same way as I have given the 1000
 " consols to my BROTHER RICHARD'S CHILDREN.
 " To my sister-in-law Sophia Newsam the interest & dividends
 " of all my India stock, IN TRUST apply the same
 " towards the education of her children, which I hope she will
 " faithfully do; & her receipt for such interest to be a
 " sufficient discharge notwithstanding her coverture.
 any one (c)
 " When either child attains 21, his other share of the stock
 to be transferred to him or her, according to the number
 " of children my s^d. sister-in-law shall then have;
 " & so as often as it shall happen that any one
 " child shall attain 21, a like transfer to be made.
 the
 " As to all, rest & residue of my money, stocks,
 " funds, securities, & also my chambers at No. 2,
 " Gray's Inn Square & all my other property
 Mr.
 in-law John Bone & a Christopher Newsom,
 " I give the same to my BROTHER a CHARLES SPEAR, (d)
 exors. (e)
 " his admors. & assigns, for his own use; (f) & I appoint
 " them (g) sole (h) to be executors.

" WM. SPEAR.

" *Gray's Inn, 31 July, 1809, (i) 1810.*"

The paper was endorsed " Intended Will."

- (a) The word " one," was struck through with a pen.
- (c) The word " either," was struck out with a pen.
- (d) The words " CHARLES SPEAR," were struck through with a pen.
- (e) The word " his," was struck through with a pen.
- (f) The words " for his own use," were struck through with a pen.
- (g) The word " them" had been " him."
- (h) The word " sole," was struck through with a pen.
- (i) " 1809" was struck through with a pen.

B.

19th August, 1810.

Whole Property. £.

| | | |
|-----------------------------------|---------|------------|
| 2000 4 per cents. at | 85.... | 1700 |
| 1300 consols. — | 68.... | 884 |
| 60 percents. long ann. — | 18.... | 1080 |
| 1000 India stock — | 182.... | 1820 |
| Chambers | | 800 |
| Furniture about | | 600 |
| Sir Jno. Q. Johnston's bond | | 750 |
| | | <hr/> 7634 |

| | |
|-------------------------|------------|
| Partnership about | 1000 |
| | <hr/> 8634 |

Disposed of by Will. £.

| | |
|-------------------------------|------------|
| 2000 4 per cents. | 1700 |
| 1000 consols. | 680 |
| 1000 India stock | 1820 |
| Legacy to my uncle | 500 |
| ditto to my brother Charles.. | 500 |
| | <hr/> 5200 |
| | <hr/> 3434 |

RICHARD SPEAR, one of the brothers of the deceased, entered a caveat, and opposed the validity of these testamentary schedules: and the executors gave in an allegation pleading,

1st, That the deceased being of sound mind, and desirous of settling his worldly affairs, wrote the paper A.; and, having approved thereof, on or about the 31st of July, 1809, or on the 31st of July, 1810, being the several dates appearing thereon, subscribed his name thereto.

2d, That the deceased being minded to make al-

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Michaelmas
Term.

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NEWSAM
v.
SPEAR.

1811.
Michaelmas
Term.


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NEWSAM
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SPEAR.

terations in his will, as well in the dispositions thereof as also in the appointment of executors, with his own hand made the alterations afterwards pleaded; and having so done, on or about the 19th of August, 1810, he wrote the paper B., and therein described the particulars and amount of the property he possessed, and specified the legacies given by paper A. to ascertain the total amount thereof, and thereby recognized and confirmed the several alterations made in Paper A.; and that the deceased, by the alterations made in paper A., appointed John Bone and Christopher Newsam executors and residuary legatees.

3d, That the whole of the papers A. and B., and the several interlineations and alterations therein, are of the handwriting of the deceased.

4th, That on Friday the 19th, and Saturday the 20th, of July, 1811, William Cardale, the partner and confidential friend of the deceased, visited him at his house at Holloway, by his the deceased's request, he being in an infirm state of bodily health, but of sound mind; and the said William Cardale, on both said occasions, then spoke to him on the subject of his will; that the said deceased, on such occasions, said he had written over the heads of his will, and signed it, and it would do very well; and upon the said William Cardale urging him to make his said will in a more formal manner, and offering his assistance therein, the deceased said he would do it, but repeated, that what he had already written would do very well, or to that effect; that about nine o'clock on the following morning, being Sunday, the 21st of June, Mr. Cardale again attended

at the deceased's said house, in consequence of a message from John Bone, party in this cause, requesting him to come immediately, as the deceased had been taken suddenly ill; but on his arrival found that the deceased had died suddenly, a short time before his the said Mr. Cardale's arrival; that John Bone, and his wife Ann Bone, being then present, the said William Cardale thought it proper to seal up and secure the deceased's property, till his relations could be assembled; and, with the approbation of the said John and Ann Bone, he proceeded to seal up and secure the deceased's effects in his house; and on inquiry for the key of the chest in which the deceased deposited his plate, the deceased's woman servant said, that the same was usually kept in the drawer of a wardrobe which stood in his bed-chamber; that the said William Cardale unlocked the said wardrobe; and upon unlocking also an internal drawer, the paper A. appeared lying at the top of other papers of moment and concern which were contained in the said drawer, the said paper A. being folded together, but not inclosed in any envelope or cover, or sealed, and the paper B. being folded therein; that the said William Cardale then proceeded to read over the said papers aloud to the said John and Ann Bone, and then observed the several obliterations, interlineations, and additions, now appearing therein; and the article concluded with pleading the plight and condition of the papers in the usual form.

JUDGMENT.

SIR JOHN NICHOLL.

William Spear, a solicitor, is the party deceased;

1811.
Michaelmas
*Term.*BONE and
NEWSAM
v.
SPEAR.

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Michaelmas
Term.

BONE and
NEWSAM
v.
SPEAR.

—two papers are propounded as his will by the executors,—which are opposed by the next of kin.

The papers themselves are important; A is superscribed as the “heads of the will of Wm. Spear, of Gray’s Inn;” the inference would be from this, that it was a paper from which it was intended that a more formal will should be drawn out;—it is dated and subscribed, and it contains a complete disposition; still, however, if it rested here, the Court must have considered it as imperfect, because it is described “heads of a will.” But alterations were made afterward in a formal manner, which look like an alteration in his intention as to this point; and there is a high probability that he intended this paper to have effect;—but the Court is not left to this conjecture.

Paper B. was written within a fortnight afterwards; this contains a calculation of the amount of his property, and then enumerates the several legacies, exactly in conformity with the will. And it is pleaded that, when the deceased was taken ill, he told his friend Mr. Cardale “that he had written the heads of his will, and signed it, *and that it would do very well*,” that Mr. Cardale urged him to make it in a more formal manner. He said he would, but repeated, that which he had already written would do very well,—and he died unexpectedly the next morning before Mr. Cardale’s arrival.

If these facts shall be proved, as they are laid in this allegation, they will be decisive of the validity of this paper; they will establish continuance of intention, and non-execution caused by the in-

terposition of death ;—the paper was found not as a cast off memorandum, but carefully preserved.

The Court can have no doubt in admitting this allegation (*a*).

(*a*) The cause came on for hearing on the 26th of February, 1812, when the allegation being proved by the evidence of Mr. Cardale, and two other witnesses, the Court pronounced for the validity of paper A., but rejected paper B.

From this sentence an appeal was interposed by Richard Spear, to the High Court of Delegates; and in the course of proceedings in that Court, Charles Spear, another brother of the deceased's, intervened; and alleging himself to be the sole executor named in paper A., propounded that paper as it stood prior to the alterations made in the three last lines;—he also gave in an allegation pleading that the alterations and interlineations in the three last lines were not made by the deceased, nor under his directions;—and that he always entertained a great aversion and contempt for Christopher Newsam.—On this allegation, fourteen witnesses were examined. The executors gave in a responsive plea contradicting these facts, on which they produced eighteen witnesses.

On February 15 and 17, 1816, the cause was argued at Serjeant's Inn, before

Mr. Justice GRAHAM,
Mr. Justice BAILEY,
Mr. Justice DALLAS,
Doctor ARNOLD,
Doctor ADAMS,
and

Doctor DONSON.

Dr. Swabey, Dr. Jenner, and Mr. Heald, were counsel for the executors;—*Dr. Stoddart and Mr. Warren*, for Richard Spear;—and *Dr. Phillimore, Dr. Lushington, and Mr. Phillimore*, for Charles Spear.

The Delegates established paper A., and condemned "Richard Spear in the costs occasioned to the Respondents by his appeal,—excluding therefrom any part of the costs which arose from the intervention of Charles Spear." They gave no costs against Charles Spear.

1811.
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Term.

BONE and
NEWSAM
v.

SPEAR.

1812.
Prerogative,
Hilary
Term,
Feb. 28.

1816.
Delegates.

Michaelmas
Term.
Nov. 29.

TAPPENDEN v. WALSH.

A married woman can make a will of property left during coverture to her sole and separate use.

AN allegation was submitted to the Court, propounding a will dated Dec. 15, 1797, and a codicil dated Oct. 2, 1801, of Anne Thompson, widow ;—both made during her coverture.

The property had devolved to her partly under the will of Anne Wilson, and partly under the will of Thomas Martin:—by the former instrument, the property had been left to trustees for her use, with a power to her of disposing of it “ *by any writing purporting to be, and in the nature of, her last will and testament.*” By the will of Thomas Martin, a legacy had been bequeathed “ *to her, and her heirs, executors, and administrators, and assigns, absolutely, and for ever to and for her and their own sole and separate use and benefit.*”

Adams and Stoddart opposed the admission of the allegation.

Swabey and Jenner, contra,

Cited Ryley and Asberry v. Lawton, Arches, 1731. Bennet v. Davis, 2d Peere Williams. Rolfe v. Budder, Bunbury (a).

(a) It stood singly on the point, whether from the circumstances she had such a separate property in the bond that she could dispose of it: and *per curiam*, clearly she is not only executrix, but the bond is devised to *her sole and separate use*, which vests the interest in her in a Court of Equity, as much as

JUDGMENT.

Sir JOHN NICHOLL.

Two objections are taken to this allegation.

First, That Anne Thompson had no right to dispose of her property by will, for want of a power from her husband authorizing her to do so.

Secondly, That the codicil disposes of property not her own, as by the will of Thomas Martin, who bequeathed it to her, it was not left to trustees for her separate use.

By the law, as it stands at present, a married woman who possesses separate property, may dispose of it without the consent of her husband.

The probate of this Court does not decide upon the right of disposal,—it decides merely on the factum of the instrument;—perhaps, if no probate were granted by this Court, the person to whom the property is left might be unable to recover it.

The general right of the wife, in this respect, has been established in a great variety of cases. In *Rees v. Rhodes (a)*, a wife without any authority from the husband, disposed of separate property, over which she had controul.

In *Bowes v. Bowes (b)*, this Court laid down that it would not look nicely into the power of the wife, as that right belonged to another Court;—

if the son had vested it in trustees for her separate use; and there are many instances where a Court of Equity has decreed an husband to stand as a trustee for the separate use of his wife. Lady Suffolk's case, who married Serjeant Maynard; Sir Joseph Hern's wife; *Seymour v. Dilkes*, Nov. 17, 1718. See *Rolfe v. Budder*, Bunbury's Reports, p. 187.

(a) *Rees v. Rhodes*, Prerog. Trinity Term, 1799.

(b) *Bowes v. Bowes*, Prerog. Hilary Term, 1801.

1811.
Michaelmas
Term.

TAPPENDEN
v.
WALSH.

1811.
Michaelmas
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TAPPENDEN
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WALSH.

in that case the Court granted a limited probate. *Richards v. Lea* is to the same effect (a).

In other Courts the same doctrine has been held. In *Fettyplace v. Gorges* (b), Lord Thurlow said, "that where personal property was enjoyed separately by the wife, it must be enjoyed with all its incidents."

The Court will, therefore, grant probate without the consent of the husband, limited to the separate property of the wife.

The second objection is, that the codicil disposes of property not her own because it was not given to trustees for her separate use. It appears to me, however, that the will of Thomas Martin does convey the property to the separate use of Mrs. Thompson, independent of her husband.—If I am at all required to give an opinion as to this point, I apprehend that, under the words of this will, a Court of Equity, or any Court, would decide that she had a right to enjoy the property independently of her husband;—at all events, it is not necessary to decide this point; it is enough for this Court to grant its probate.

I have no difficulty in admitting the allegation;—nor shall I have any difficulty, if the facts are proved, in granting a limited probate.

(a) *Richards v. Lea*, Michaelmas Term, 1805.

(b) "All the cases shew that the personal property, where it can be enjoyed separately, must be so with all its incidents; and the *jus disponendi* is one of them."—*Fettyplace v. Gorges*, Brown's Chancery Reports, Vol. III. p. 10.

ARCHES COURT OF CANTERBURY.

FAREMOUTH and Others v. WATSON.

*Michaelmas
Term.
Dec. 4.*

An Appeal from the Consistory Court of Exeter.

JUDGMENT.

Sir JOHN NICHOLL,

A civil suit to annul an incestuous marriage brought by the sisters of the husband.

This suit originated at Exeter, but was brought into this Court by appeal on an incidental question; the cause has been retained here, and now comes upon the merits as an original cause.

It is a proceeding to declare void the marriage of Samuel Watson with Catherine Kingwell, on account of affinity, she being the sister of Ann, his former wife.

The suit is brought as a civil suit; the parties bringing it are the sisters of Samuel Watson, who have an interest under the will of their mother, contingent upon the death of their brother without lawful issue;—these sisters are also his next of kin;—the Court has already on the admission of the allegation (a) given an opinion that a slight interest is sufficient to enable a party to bring a suit of this

(a) Arches, May 12, 1810; the admission of the allegation was opposed, and the Judge took time to deliberate whether the parties promoting the suit had not set forth sufficient interest to authorize the Court to entertain the question. 1

1811.
Michaelmas
Term.

FAREMOUTH
and Others
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WATSON.

description, and there is full proof of a sufficient interest here.

The marriage of John Kingwell, the father of the two sisters, with Ann Wedger in 1748 is proved by the entry of that marriage, and by their subsequent cohabitation, reputation, and acknowledgment.

The birth and baptism of their children, Ann and Catherine, is also proved by the entries of their baptism, and reputation, and acknowledgment as the children of John and Ann Kingwell;—and by their reputation, and acknowledgment of each other as sisters.

The marriage of Samuel Watson in 1780 with Ann, and her subsequent death, are proved by the registers;—Ann died in 1788; it has been objected that these facts were not proved by any one who was present either at the marriage, or the funeral. This is not necessary;—their identity is sufficient,—proof by exhibits is more stringent,—besides, there is no attempt to prove diversity,—it would have been important to the adverse party, himself and his children to have proved it;—his silence, therefore, tends to confirm the fact, and there is no suspicion of collusion.

The subsequent marriage of Samuel Watson with Catherine, the sister of his first wife, is not proved by direct evidence of the fact, or by the entry in any register;—the place of that marriage having been kept secret;—but the cohabitation of these parties,—their acknowledgment of each other as husband and wife,—their having had four children as their issue,—and their always claiming to be husband and wife, is most fully proved.

Eighteen years of cohabitation, reputation, and acknowledgment,—the concealment of the place where the marriage was celebrated,—the absence of all attempt in the party himself to deny or disprove the fact,—leave no doubt in my mind that for the purposes of this suit the fact is sufficiently established.

If no marriage took place,—no injustice will be done ;—here is an incestuous connection which ought to be stopped,—and the issue are illegitimate.

The Court, therefore, cannot do wrong in pronouncing the marriage void, and in signing the sentence prayed.

1811.
Michaelmas
Term.

FAREMOUTH
and Others
v.
WATSON.

PREROGATIVE COURT OF CANTERBURY.

Wood v. Wood.

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Dec. 6.

JUDGMENT.

Sir JOHN NICHOLL.

James Wood is the party deceased; he died on the 29th of March, 1809, leaving Jane Wood his widow, and also a mother and brother, several sisters, and some nephews and nieces: he had real property to the value of about 20,000*l.* and personalty amounting to about 13,000*l.*

An unexecuted paper, being a paper of instructions marked A. and which refers to a will of the

Part of a will established, and part held not to be entitled to probate.

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deceased's brother Jacob, has been propounded by the widow, as containing with that will so referred to the will of the deceased.

Another paper B. which was the draft of a will prepared from A., has been propounded at the hearing of the cause; and I am now prayed in the alternative to pronounce for A. and B., or for A. and the brother's will.

All these papers are opposed by the mother, and three other next of kin, who pray an intestacy.

The history of the papers, as given in the evidence, is to this effect:—the deceased was taken ill on Sunday, the 26th of March, 1809; he was rather better on the Monday; but on the Tuesday morning he grew worse. On that morning, *Amy White*, a maid servant, who is examined on behalf of the opposer, states,

“That about eight o'clock, the deceased expressed a wish that his solicitor, Mr. Edis, should be sent for, and asked the respondent to go for him; but she was prevented so doing by Mrs. Wood, the deceased's wife; and soon afterwards the deceased asked her if she had been to Mr. Edis; and on her telling him she had not, he seemed quite angry, and desired her to tell Mr. Thomas to come up to him for that purpose, which she accordingly did.”

Mr. THOMAS, (who was clerk to the deceased,) states,

“That about eleven o'clock, he was desired by the deceased to go to Mr. Edis, his solicitor, and desire him to come and take instructions for his will. He accordingly went, but Mr. Edis was not

"at home; he left a message for him; Edis came shortly afterwards, in the forenoon, and he accompanied him up stairs into the deceased's room."

So that the whole originates with the deceased himself;—the animus testandi is strongly marked, he is angry with the maid for not going to Edis: Mrs. Wood had no desire for a will, she prevents the maid from going,—the deceased then sends his clerk; so that the intention of making a will, and dying testate, is quite spontaneous, and is decided.

Mr. Ears then takes up the account, "that, on entering the room, the deceased shook hands with him, and addressing him, said, 'I want you to make my will.' The deponent asked the deceased to give him instructions; pen, ink, and paper, were brought; the deceased gave instructions verbally; which he wrote down in the deceased's presence;—that the deponent prepared the will of the deceased's brother Jacob, who died about a year ago; the deceased was one of the acting executors, and well acquainted with the contents thereof; and being desirous of making his own will, in great measure, similar to the will of his late brother, he referred thereto by telling the deponent that he meant his wife to be left exactly as Mr. Jacob Wood's wife was; and the deponent then wrote the same down in nearly the same words as dictated by the testator; the deceased then proceeded to dictate the rest of the instructions, and the deponent wrote the same in manner aforesaid, being the whole of the testamentary schedule A. except (besides something quite immaterial,) that he wrote the words "if children; if none, to have estate and effects sub-

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“ject as hereunder ;” subsequently to taking such
“instructions, as will be hereafter deposed ; that as
“he wrote each clause, he, as he recollects, read the
“same ;—that the deceased was very ill, and the de-
“ponent was as concise as possible in taking the in-
“structions ; yet, he is certain they were exactly
“conformable to the deceased’s wishes, and met his
“approbation ; that having completed them, he of
“his own accord said he would immediately go
“home and prepare the will, and then left the de-
“ceased, taking the instructions with him.”

Mr. THOMAS “well recollects the deceased men-
“tioned his intention to make his will in great mea-
“sure similar to that of his late brother Jacob,
“by saying that he meant his wife should be left
“exactly as his brother Jacob’s wife was, and that
“his mother should be left the same as in his brother’s
“will ; that, as Mr. Edis wrote down the instructions,
“he read the same clause by clause to the deceased,
“who well understood and approved thereof, to the
“best of the deponent’s recollection ; Mr. Edis,
“when he had completed the instructions, read them
“all over to the deceased, who expressed his appro-
“bation thereof, and desired the will to be prepared
“as soon as possible.”

Mr. DAWES, who was an intimate friend of the
deceased’s, and joint-executor with him under his
brother Jacob’s will, states, “that being informed
“the deceased wanted to see him, he went into his
“room, and found Mr. Thomas and Mr. Edis with
“him ;—Edis was writing ; he was informed they
“were instructions for the deceased’s will. Edis said
“the deceased had expressed himself very anxious

"that the deponent should be one of his executors ;
 "he asked the deceased if he wished him so to be ;
 "to which he replied, ' Yes, he did very much.' The
 "deponent answered he would not hesitate, if he
 "would let him know with whom he was to act. The
 "deceased said he meant his wife to be one of the
 "executors ; after which some conversation ensued
 "about the propriety of appointing a third, the de-
 "ponent suggesting such propriety, and asked the
 "deceased if he would have either of his relations
 "appointed or not. The deceased decidedly an-
 "swered, ' No.' Mr. Turner and his son were pro-
 "posed,—the deceased stated his reasons for not
 "adopting them, and at length, Mr. Ayton, Mr.
 "Dawes's then partner, was fixt upon." Mr. Dawes
 "adds, ' that the deceased being at such time setting
 "up in bed, threw himself rather back on his pillow,
 "and said, ' Now I am satisfied.' That the whole
 "instructions were read over to the deponent in the
 "deceased's presence and hearing ; and he well re-
 "members that it was intended by the deceased, that
 "the will of his late brother Jacob should form the
 "basis of his will, for the deponent well remembers
 "that in such instructions, which were read over to
 "the deceased as well as to the deponent, and were
 "also looked over and read by the deponent, as Mr.
 "Edis was writing, the latter part began with ex-
 "pressing that Mrs. Wood was to be left exactly as
 "Mr. Jacob Wood's wife was, and that the deceas-
 "ed's mother was to be left similarly, as under Mr.
 "Jacob Wood's will ;—that he is quite certain the
 "deceased perfectly well knew and understood the
 "whole contents of the instructions ; and that he,

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" the deceased did, in the deponent's presence, declare the same to be quite as he intended his will to be."

No evidence can more strongly, clearly, and uniformly, mark a fixed and decided testamentary intention, and more particularly the intention of leaving his wife exactly the same as his brother Jacob had left his wife.

The next of kin have given an allegation pleading incapacity arising from delirium the whole of this day.

They have examined four witnesses; the two apothecaries, neither of whom saw him till that evening.—

The maid servant, who says, " that he was free from delirium till the afternoon, about three o'clock. And

Dr. Meyer, who says, " that when he visited him in the morning, between eight and nine, or between nine and ten, he was in a state of strong delirium, (which renders it probable that his conversation with the maid servant, when he desired her to go for Mr. Edis, was at a later hour than she mentions,) but that between twelve and one, when he again visited the deceased, he found him free from delirium, quiet, and perfectly rational, and so far from being incapable of giving instructions for his will, that he considered him fully capable, and he would not have hesitated becoming witness to a will at that time, had he been requested;—that when he visited him on the same day in the evening, he found him in a high delirium, and he died next morning;—that when

" he visited him the second time about noon he
 " saw some persons with him, but does not recol-
 " lect who they were."

The evidence then upon the opposer's own al-
 legation, though it proves prior and subsequent
 delirium; yet, at the time of the transaction, it
 proves an entire absence of disorder, and perfect
 capacity.

The Court, indeed, has more satisfactory evi-
 dence than the opinion of any witnesses, *viz.* the
 conduct of the deceased himself, which leaves no
 doubt of his capacity.

The paper of instructions which was written,
 was to this effect:

" Mrs. Wood to be left exactly as Mr. Jacob
 Wood's wife was.

" Rings the same, except as below.

" My mother to be left similarly as she was under
 Jacob's will.

" My three sisters 50*l.* each.

Then some other little legacies and rings, and
 Ayton, Dawes, and Mrs. Wood, executors.

This paper then precisely corresponds with the
 parole account given by all the witnesses. The
 disposition in favour of the wife and mother is
 only intelligible by a reference to Mr. Jacob Wood's
 will, which, in substance, is to this effect: -

" Mr. Jacob Wood gives his wife 400*l.* per
 " annum, and the residue to his children, if the
 " child which he has (having then one son,) or any
 " other child, should live to the age of twenty-one;
 " but if this son, and all other children, die before
 " twenty-one, then the interest of the whole to the

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" wife for life; and after her death, the reversion
" to his mother, brother, and other relations. The
" mother has a legacy of 120*l.* besides her rever-
" sionary interest in the residue."

The intention of the brother seems to have been to give the wife 400*l.* per annum, if they had any child or children; and if none, (and at the time of making the will he had none,) the interest of the whole to her for her life; and after her death, the reversionary interest to his own family, to his mother, brother, and sisters.

The deceased was perfectly capable; it is strongly pleaded that he well knew the contents of his brother's will; he was the acting executor under it. Mr. Edis had drawn the will,—he must have perfectly understood his intention. Mr. Dawes also was executor under that will. The only possible doubt could be whether, as his brother's wife was *de facto* only receiving 400*l.* he having left a son, the deceased intended to give his wife only 400*l.* a year; or whether he intended to give the whole for life, (he having no child,) as his brother's wife would have in the event of her child dying. I should have thought clearly that he meant her to have an annuity of 400*l.* at all events, and a life interest in the whole, if there were no children; and then the whole to go to his mother and other relations; and such I think is the construction of the paper itself. The Court would have no room to entertain any judicial doubt as to the intention.

Suppose then the deceased had been struck with sudden death the moment these persons left his room;—here was the deceased himself, of his own accord sending for his solicitor to make his will,

—in possession of full capacity,—dictating instructions,—these instructions reduced into writing;—read over,—approved by him,—containing a full disposition of his property,—no doubt or hesitation of his intention,—his friends round him,—no supposition of any improper influence, and the solicitor carrying away the instructions to prepare a will as expeditiously as possible from them;—but before he could prepare the will the deceased became incapable by the act of God, and died the next morning.—If the case had rested here, the Court could not, proceeding according to its ordinary rules; have hesitated in pronouncing for this paper.

The question then is, whether anything happened afterwards, either to add to or to take from this paper; and the more clear, distinct, and deliberate, the intention was at this time, the more clear should be the proof of any subsequent alteration.

There is introduced into this paper of instructions a most important additional clause, in these words, "*if children; if none, to have all the estate and effects, subject as hereunder:*" these words were written by Mr. Edis, the solicitor; and it is admitted that they were not written till he was informed of the deceased's death. Now no case has been furnished where an additional clause or bequest, written after the testator's death, has been established. The Court would be very sorry to make the precedent, more especially under the circumstances of this case;—perhaps this alone would be sufficient for me to direct the whole clause to be struck out;—but as it may be necessary to examine the whole case, in order to see whether the former

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part of A. is in any degree affected, or whether B. which was written in the deceased's lifetime, can be supported, the further evidence must be considered. — The effect of this clause, the substance of which is introduced into B. is to produce a very important change in the disposition; — the clause runs thus: —

“ Mrs. Wood to be left exactly as Mr. Jacob's wife was, if children; if none, to have all the estate and effects, subject as hereunder.”

What is the effect of this? Here is no child, — why that Mrs. Wood, instead of taking a life interest in the whole, takes the whole absolutely; instead of being left exactly as Mr. Jacob Wood's wife was, or would have been if her child had died, she has an absolute interest instead of a life interest; the relations, and among others the mother, instead of having a reversionary interest in the residue, are wholly excluded, notwithstanding the mother is by this very paper expressly “ *left similarly as she was under Jacob's will;*” and all the witnesses saying the deceased perfectly understood and approved the paper, and declared it was exactly what he wished.

This most important alteration, made after the deceased had so deliberately given full instructions for his will, after he had marked a decided intention to make his brother Jacob's will the basis of his own; — had directed his wife in part to be provided for as his brother Jacob's wife; — had sent away the solicitor to prepare the will as expeditiously as possible; — the whole transacted in the presence of two confidential friends: I say this important alteration, if it had been reduced into writing in the de-

ceased's presence, and read to him; and standing upon the single testimony of one person, would have staggered and alarmed the Court; if not as to the correctness of the witness, at least as to the capacity of the deceased. Such a change of intention,—not a slight difference in the amount of the legacy, but in the very basis and leading principle of his will, would have called upon the Court to have examined very narrowly whether his full capacity continued; carefully, to have ascertained whether he was fully understood by the witness, whether his capacity and intention had been fully proved, or whether there might not be some misapprehension between the witness and the deceased. What then is the account given?

Mr. Thomas says, “that the deceased, previously to sending for Mr. Edis to make his will, told the deponent that he meant to leave all his property to Mrs. Wood, subject to such legacies as he should bequeath.”

When this declaration was made does not exactly appear, though I should understand the witness as meaning that the deceased said so at the time he sent for Edis;—but on a single loose declaration of this sort, the Court can never rely;—such a declaration is so liable to be misapprehended, so liable to be not exactly remembered, so liable to be loosely made without restriction, where only meant *sub modo*.

The deceased might so express himself, though meaning to leave the whole but “*for life only* ;”—or the witness might not hear the limitation or restriction for life :—it is not corroborated by other declarations ; there is no suggestion that it was the

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generally declared intention of the deceased to leave every thing to his wife, in exclusion of his other relations.—This conversation, then spoken to by Thomas, affords very little proof of such an intention;—but if it was his idea then,—he had, when he set about the act, come to a complete determination to make the same division between his wife and his family that his brother Jacob had done,—to her the whole for life, as there were no children;—but then the property to revert to his own family.

Mr. Thomas goes on: “that, on going down stairs with Edis, he told him that if Mrs. Wood was to be left *exactly* as Mr. Jacob Wood’s wife, it would not correspond with what the deceased—had, as aforesaid, previously told the deponent,—and he states that Edis then went to Mr. Dawes in his counting-house.”

Dawes says, “that, after he had been a short time in his office, on coming down from the deceased, Edis came to him there; and the deponent having recollected that the circumstances of Jacob Wood’s will could not entirely form the basis of the deceased’s will, as the deceased had no child, and Jacob left a son; he mentioned the same to Edis, and as there might be a child, that a similar trust must be created for such child, as Jacob had created for his son; and he advised Edis accordingly to go up stairs to consult the deceased, which he did.”

Edis says, “that as he was going to prepare the will, seeing Mr. Dawes in his counting-house, he went in, and shewed him the instructions; and some conversation was then started by Mr. Dawes, on the subject of the deceased’s having

“ left, this will the same as his brother Jacob’s
 “ wife, and the dissimilarity there was in their si-
 “ tuations, Jacob having left a son ; and suggested
 “ the propriety of providing for the deceased’s
 “ leaving issue, although he had none at that time ;
 “ and thereupon the deponent, at the suggestion of
 “ Mr. Dawes, returned to the deceased, and asked
 “ whether, in the event of his leaving no child, he
 “ meant the residue of his property to go to his
 “ own relations, as his brother Jacob had directed
 “ by his will ; to which the deceased replied as if
 “ he recoiled at the idea of leaving his property
 “ from his wife, if he should leave no child, ‘ No,
 “ all to my wife ;’ that having obtained no further
 “ instruction from the deceased, he again left him
 “ without having written down such further in-
 “ structions.” He then says, that he went home
 and prepared the draft of a will B., which he carried
 to the deceased about five o’clock in the evening ;
 but he was then delirious,—that he died the next
 morning,—and being informed he was dead, he
 then wrote the additional clause, “ if children,” &c.
 in the paper of instructions A.

This is the account of the addition to A. and the
 writing of B.; and it is contended, and prayed, that
 if that clause in A. (not being written till after the
 death,) cannot be pronounced for ;—yet, that B.
 having been written in his lifetime, though not in
 his presence, nor even read to him, may be pro-
 nounced for, being conformable to such further
 instructions.

Upon the point of law, there certainly have
 been cases where a paper written in the life-
 time of the testator, but neither reduced into

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writing in his presence, nor read over to him, has yet been established: but then they have been so established upon cases perfectly clear, both as to the intention of the deceased, conveyed by his instructions, and that the paper was exactly conformable to such clear and decided intentions. The Court has always acted with extreme caution in such cases;—but such is the principle laid down in several within my own recollection. In *Bury v. Bury* (a).—*Campbell v. Campbell* (b).—*Wingrove v. Bye* (c).—*Simpson and Davison v. Temple* (d).—*Hoare and Hayes v. Hayes* (e).

Is there then, in this case, such clear evidence of the intentions of the deceased, and of the accuracy of paper B. as the Court has always required?—There is much confusion between the witnesses.—According to Thomas, you would suppose that the suggestion originated with him, in consequence of what had previously passed between him and the deceased respecting the wife, and that Edis upon that went to Dawes to consult him what was to be done.

According to Edis,—he went to Dawes to shew him the instructions; which was strange, as Dawes was present when they had been given in part, and had just heard them read.

According to Dawes, it was an idea started by himself, that there would be children; and he and Edis agreed that if children should be born, it would be

(a) Prerog. Hilary Term, 1791.

(b) Prerog. Michaelmas Term, 1797.

(c) Prerog. Michaelmas Term, 1799.

(d) Prerog. Trinity Term, 1801.

(e) Prerog. Hilary Term, 1807.

proper that a trust should be raised for them, and that the deceased should be consulted upon that point ; and in that Edis agrees. It seems rather extraordinary that they should have thought it necessary to have consulted the deceased upon that point ; for surely the instructions already given implied it. —The deceased had already declared that his brother's will was to be the basis of his own ; that his wife was to be provided for exactly as his brother's. How would Mr. Edis have drawn the will ? After the legacies he would have given 400*l.* a year to the wife ; he would have given the residue to the children, if any should be born ; but in case of no issue, or the issue dying, then the residue to the wife for life ; and then to the relations. To leave the wife exactly as the brother's,—to provide for the contingency of children being born,—it wanted no further instructions for that purpose ; and yet, both Edis and Dawes say that it was to consult the deceased on that point, and on that point only, that Edis again went to speak to deceased. But how does Mr. Edis state that he put the question ? Not one word of providing for the children, if he should have any, and raising a trust for their benefit ; but “ whether, in the event of his having no child,—he meant the residue of his property to go to his relations ? Not whether in the event of having a child he would have a trust raised to provide for that child ? How, going for the purpose of consulting the deceased upon the event of his having children, could he possibly have put this single question upon the event of his having no children, is not easily un-

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derstood;—but if the question was thus put, how must the deceased have understood it? Why the residue after the annuity of 400*l.* to the wife;—How was the case of the brother's wife? She left a son,—she had an annuity of 400*l.*, the residue was to provide for the son. The deceased, who was acting executor, well knew this; he then most naturally understood the question, whether, if there was no child, the residue should go to the relations." His answer is, "No, all to my wife." That is, not only the 400*l.* a year, as my brother's wife has; but the interest for life of the residue, in case we have no children,—as my brother's wife would have had in the same event.

Supposing the deceased's faculties had been ever so alert and alive, this was a very natural and probable misunderstanding, considering how explicit he had been, that he meant to do exactly the same for his wife that his brother had done; and also for his mother:—in any other understanding of the question, how could the deceased possibly have recoiled at the idea of leaving his property from his wife, leaving the whole for life,—he must have understood it, the residue beyond 400*l.* a year.

But that upon this single question, and single answer, the Court is to take it, that the deceased had totally changed the whole plan and principle of his testamentary disposition, and that he meant now to exclude his own family altogether from any reversionary interest in his property, is quite impossible. The Court would require that his change of intention should be most distinctly ascertained

by conversation and explanation, so that there could be no possibility of doubt of the deceased's meaning. The Court would also require that his capacity should have been fully proved, even if the question and answer were not liable to any misconception. The deceased had been strongly delirious a short time before;—he was again strongly delirious in a short time (within about two hours) after;—he had been fatigued by this transaction, by giving instructions for the will, and the discussion respecting the executors; he had thrown himself on his pillow, rather rejoicing that he was relieved when the business of the third executor to be appointed was arranged. He had been left some little time, since his friends had quitted the room,—he would naturally be in a dull torpid state,—not readily apprehending a single question, nor accurately ascertaining his own meaning by a single answer to that question. Under such circumstances, to pronounce for a paper not written in his presence, and never read over to him, would be going infinitely further than the Court has ever done, or than it can ever safely do.

In addition to this, what is paper B.? Why it contains a direction beneficial to the widow; that she shall at all events, even if there were children, have all the dividends for the first year;—a bequest not warranted by the brother's will, nor by any directions suggested to have been given by the deceased himself. It is said, this bequest is inoperative; so it may be by events;—but how can the Court rely in any degree on the accuracy of such a paper? This bequest, and the disposition of the residue abso-

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lutely to the wife, would both be introduced with less caution, as Mr. Edis expected that the whole would undergo the revision of the deceased, and that would make him less careful on this second interview to explain the matter more fully, and exactly, or to write down this important alteration, and read it over to the deceased, and take care that he fully understood the nature of this change.

The Court, therefore, has not the least doubt or hesitation in rejecting paper B.;—but in respect to A. I shall strike out the clause written since the deceased's death.—With the exception of that clause the paper is fully proved to have been dictated by the deceased,—read over and approved by him,—and by referring to the will of the brother to contain the testamentary intentions of the deceased.—Nothing which passed afterwards has satisfied me that the deceased in any degree departed from or altered those intentions.

I pronounce for A. together with the will of Jacob Wood therein referred to, as together containing the will of the deceased, the words of the clause in A. being first struck out.

The Judge accordingly struck out with his own hand, the following words in paper A., "*if children : if none, to leave all estate and effects subject as hereunder.*"

PREROGATIVE COURT OF CANTERBURY.

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Jan. 23.MOORE and METCALF v. DE LA TORRE. v.
MOORE (a).

CATHERINE Moore died August 16, 1813, possessed of a personal estate amounting to about 30,000*l.*; she left three sons, Thomas, George, and Peter; Peter was a lunatic.

A mutilation of a will held to amount to a cancellation, and that cancellation not to revive a prior will of nearly similar import.

The following testamentary papers were found at her death.

(A.) " In the Name of the Father, and of the Son, and of the Holy Ghost. Amen.

" I, CATHERINE DE KILLIKELLY
" and MOORE, Widow to the late George
" Moore, of Ashbrook, and Moore Hall, Esq.
" declare, before my God and man, my last
" Will and Testament, under my hand and

.(a) The Author has been induced, in compliance with the suggestions of several of his professional friends, to give this case, both in the Court of Prerogative and the Court of Appeal, and also the case of *Johnson v. Johnson*, decided in the Prerogative Court in the course of the last year, a priority over many cases which have preceded them. It is thought that the important points of testamentary law, which have been agitated in both instances, will justify this preference.

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“ seal, in my perfect senses and good health,
“ that if the Almighty pleases to call me to
“ himself, on the road going to Ireland, or
“ any where else, or by some other unfore-
“ seen accident, as we are all mortal, leave
“ every thing I possess in Spain, England,
“ Ireland, or any other part of the world, as
“ property, lands, houses, money, jewels, plate,
“ linen, and every kind of houseal furniture
“ of every description, between my son Thomas
“ Moore, and my son Peter Moore, if the
“ latter gets back his senses again; in case it
“ is not God’s will this should happen to him,
“ pray his B^r. Thomas Moore, to do by him
“ as it would be most comfortable to be done
“ to himself, if himself was the person in-
“ flicted by the divine hand. I name my son
“ Thomas Moore sole executer of all I have,
“ or will have, or possess. In my husband’s
“ will, made in Alicant the year 94, is ex-
“ pressed, that if any of my sons disobed me
“ in any respect, I might give his share to any
“ other of his sons, as I pleased or thought
“ proper. I now exclude and disinheirite my
“ eldest son, George Moore, (possessing all
“ his father’s lands in Ireland,) him and all his
“ heirs for ever and ever, to have the least
“ claim or title to any thing belonging to me;
“ as likewise, any thing that his father left to
“ my disposal upon no pretext whatever, for
“ his ungratefulness, undutifulness, and disre-
“ spect to me, the best and fondest of mothers
“ to him more than any of her other sons;

" that, brought John and Tom to be jealous
 " of me on his account, when he got the last
 " sum out of my power, as only executrix,
 " gives himself away for life, into a family
 " that he knows in his heart were the means
 " of his father's and brother's most miserable
 " and untimely death; who the meanest and
 " most ill-natured of sons, his recompence
 " to me for all my sincere affection and tender-
 " ness I had ever for him in particular is to
 " conclude his ruin, without even letting me
 " know one word, neither ask my advice, or
 " wait for my answer, which he ought to have
 " done, after so often protesting to me he
 " would rather *die* than once offend me, and
 " that he was coming over to Spain, who can
 " believe such a person. I declare before
 " God, who is the Searcher of hearts, that he
 " has deceived me more than I can have words
 " to express, therefore in my turn must re-
 " nounce him to be my son, and errace him
 " as much as possible out of my memory, till
 " my latest breath; I leave my B^r. Mr. Bryan
 " Paul de Killikelly, one 100 pounds; my S^r.
 " Fanny at Rouen in France, one 100 pounds,
 " a year while she lives to pray for me; to
 " my niece O'Neill de Arlox, fifty pounds a
 " year while she lives, or for life; to Micaela
 " Perez, for her good services, a piset a day
 " for life; to my two nieces in Lisbon, fifty
 " pounds each; to the nun Miss. Moroy in
 " Paris, twenty pounds to pray for me; to Do-

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" loxes my grand niece, daughter to O'Neill de
 " Arlox, fifty pounds to pray for me; to my
 " nephew, Mr. Arthur, twenty pounds to pray
 " for me; if please God I die in Ireland, I
 " desire my son Thomas to have *me* carried to
 " Galway, to be buried in the Convent of
 " Fryar's, of St. Dominick, near the place
 " where my uncle, bishop Killikelly lays, as I
 " should never consent to leave my bones on
 " any spot belonging to my once dearly be-
 " loved son. I desire my son Thomas to have
 " my funeral as simple as possible, no ostenta-
 " tion, but corresponding to me. I leave two
 " thousand masses to be said for me from the
 " day of my death, as fast as they clergy can
 " say them, looking out for the best and poorest
 " livers, at 6 reals each mass; three high
 " mass's, and the whole office, to be said be-
 " fore I am laid under ground; 20 pounds to
 " be given to the poor the day of my burial;
 " to Micaela Antonio, and Visenta, mourning,
 " and an ounce each; to Marg^a. the French
 " maid, her wages to be paid, her mourning,
 " and an ounce besides, to Tomasas S^a. and
 " nephew an ounce each: my nurse's son in
 " Bilboa. two ounces my son Tom's nurse,
 " and ounce Aug^a. mourning, and an ounce
 " of the 14 in Mr. Moore will to be por-
 " tioned I only paid three of them, they must
 " be paid by my son Tom, if I don't live to
 " do it; of the two thousand mass's I leave to
 " be said for the repose of my' soul, 200

" of them must be offered in the Capuch
 " in convent, in Alicant, where my dear aunt
 " is buried, and fifty in each church, and
 " and convent in Alicant likewise for me ; all
 " my best silk cloaths to be cut up and made
 " into vestments, for the alter; all my other
 " cloaths and linen to be divided between my
 " S^r. Fanny and my niece Helen O'Neill;
 " what they don't like of them I leave to
 " Micaela, and the other good servants that
 " shall attend me in my last sickness, paying
 " them well besides; to my confessor 10
 " guineas to pray for me; let him and the
 " other clergyman who says mass for me and
 " assits at my funeral, be payed as they ought
 " to be. I leave a guinea to the woman who
 " will dress my corps; if I die in London, I
 " order my body to be buried at St. Pancras;
 " the 9th and 30th day after my decease,
 " to be said each day 33 masses if poss-
 " ble, they can do it; in case the Court of
 " Spain dos not continue to pay the Spanish
 " chapel here, I will take it for my Acc^t to pay
 " the clergy, the four now in it, 4 women,
 " and the porter, besides the boy's school, and
 " must get one for thirty-three girls at my
 " expence. I have money here in the funds,
 " besides six thousand dollars for this purpos,
 " in my trunks in Spain. I have a small
 " annuity here of twenty guineas a year, in
 " peaceable time, this sum I leave for ever
 " and ever to have masses said for the repose

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" of my soul particularly, must be offered by
" clergy without reprove from heaven. I
" leave Micaela and Marg^a, the bed and
" bedstead they lay on in my house in Alicant,
" with two pair of sheets each, and to Mi-
" caela 3 table-cloths, and 11 napkins with
" blue strips, I had three French ones; to my
" niece Helen O'Neill, 4 pair of my own
" sheets, 4 middleing table-cloths, 2 dozen
" napkins, 1 dozen fringed towels, 1 dozen
" coarse new cloths, that she should pray
" for me; Mrs. Atby one hundred pounds.
" I thank God I have no debts to pay, but
" forgive my B^r what he owes me. I better
" my son Thomas in every thing which the
" laws of Spain permits, provided he don't
" marry like his B^r Geo. into a family he
" knows I dislike, my niece de Arlox, will tell
" him one of them. George married without
" ever leting me know one word of his match,
" neither asked my advice, nor waited for my
" consent; for this reason exclude him for
" ever and ever, to claim any inheirittance
" from me, nor do I wish ever to see him
" while I live, nor any body belonging to him,
" for carring my gray hairs to the grave with
" sorrow. I leave Pedro Perez, mourning;
" and an once to Maria, the old woman, that
" come to diner for charity, half an onze to
" pray for me; to her son, the Capuchin
" Fryar, half an onze to say forty masses in
" my intention at a pisset. I leave all my

" power to my son Thomas, in regard to any
 " property belonging to his B^r Peter to manage
 " it for him, till please God he gets back his
 " five senses, excluding his B^r. George to have
 " any thing to say to him, except to give up
 " by my commands the fortune his father left
 " him in the Irish Will, being a better B^r.
 " and dutiful son ; and do declare, that George
 " did not follow my advice about getting him
 " back his senses, and for so doing I shall
 " never forgive myself to have sent him from
 " Spain, to be tutored by such an unworthy
 " son as George has proved to me by his un-
 " dutiful actions. My blessing to my two sons
 " Thomas and Peter, may heaven shower upon
 " them both every blessing, to be good and
 " dutiful to the fondest and best of mothers.

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" I sign with my own hand and seal

" CATHERINE DE KILLIKELLY

" and MOORE. (L. S.)

" London, 29th May, 1808."

B.

(The black lines are to shew in what manner the original paper was found cut.)

" In the name of God, Amen.—I, Catherine
 " Moore, late of Alicant, in the kingdom of
 " Spain, but now of Wimpole-street, in the
 " parish of St. Mary-le-bone, in the county
 " of Middlesex, in the kingdom of England,
 " widow, do make and publish this my last

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“ will and testament, in manner following,
 “ (that is to say) I will and desire that my
 “ dear son, Thomas Moore, shall and do, as
 “ soon as conveniently may be after my de-
 “ cease, procure my remains to be decently
 “ and carefully deposited in some appropriate
 “ place in England, until a convenient oppor-
 “ tunity shall by him be obtained for safely
 “ conveying my remains by sea to Spain ; and
 “ when such opportunity and conveyance shall
 “ have been so found and obtained by him,
 “ then I will and direct that my said son,
 “ Thomas Moore, do and shall cause and pro-
 “ cure my remains to be decently and care-
 “ fully conveyed to the city of Alicant, in the
 “ kingdom of Spain aforesaid, and afterwards
 “ that he shall procure them to be interred in
 “ my own vault in the Capuchin church, out-
 “ side the said city. I also will and direct that
 “ all my just debts, funeral expences, and the
 “ charge of the probate of this my will, be
 “ paid out of my personal estate by my said
 “ son, Thomas Moore, my executor, and
 “ charged and chargeable with the payment
 “ thereof. I devise, give, and bequeath all
 “ my lands, tenements, and hereditaments,
 “ whether in freehold or copyhold, and also
 “ all and singular my personal estate, goods,
 “ chattels, household furniture, plate, books,
 “ wearing apparel, stock in the public funds,
 “ ready money, bonds, mortgages, notes of
 “ hand, and all other securities for money,

"rent, arrears of rent, interest of monies,
 "debts due and owing to me, and all other
 "my estate and effects, of what nature and
 "kind soever, and wheresoever situate, whe-
 "ther it be in Spain aforesaid, or in England,
 "Ireland, or elsewhere, that I shall be seized
 "or possessed of, interested in, or entitled to
 "at the time of my decease, unto my said
 "dear son, Thomas Moore, to have and to
 "hold the same, and every part thereof, unto
 "him the said Thomas Moore, his heirs, exe-
 "cutors, administrators, and assigns, for ever,
 "or according to the nature and quality there-
 "of, and to be by him, my said son, Thomas
 "Moore, peaceably and quietly held, occupied,
 "and enjoyed for ever, free from the claim or
 "demand of any other person or persons whom-
 "soever, and only subject to the payment of
 "my debts, funeral and testamentary ex-
 "pences as aforesaid: and further, to be sub-
 "ject to such legacies (if any) which I may
 "hereafter bequeath by any codicil or codi-
 "cils to be added to this my will. And, lastly,
 "I do hereby nominate, constitute, and ap-
 "point my son, Thomas Moore, sole execu-
 "tor of this my last will and testament; and
 "I do hereby revoke and make void all former
 "and other wills by me at any time hereto-
 "fore made, and do declare this only to be
 "my last will and testament. In witness
 "whereof I, the said Catherine Moore, the
 "testatrix, have, at the bottom of the first

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"sheet of this my will, (the whole whereof is
 "contained in two sheets of paper), subscribed
 "my name, and to this second sheet, my hand
 "and seal, this thirteenth day of December,
 "in the year of our Lord one thousand eight
 "hundred and ten.

"Signed, sealed, published, and de-
 "clared by the above-named Cath-
 "rine Moore, the testatrix, as and
 "for her last will and testament, in
 "the presence of us, who, at her
 "request, and in her presence, and
 "in the presence of each other,
 "have subscribed our names as
 "witnesses thereto,

C. MOORE. (Seal)

"Eleanora Archdeacon, } East Street,
 "Edw^d Archdeacon, } Manchester
 "P. Archdeacon, } Square.

C.

(a) *London, the 6th August, 1812.*

"In the name of God, Amen.—I, Catherine
 "Moore, widow of the late George Moore,
 "of Ashbrook, and Moore Hall, Esq. in the
 "county of Mayo, in Ireland, make my last
 "will and testament, in my perfect senses and
 "good health, not knowing how soon, neither
 "the hour or instant, that the Almighty God

(a) There were many erasures and interlineations in this paper.

" should call me to himself out of this world.
 " wish and desire my will should be
 " made in the following manner by a lawer
 " approved of; I bequeath my son Peter
 " Moore while he lives unsain, three
 " hund^d pounds a year, that he should be well
 " taken care of, and have what may be com-
 " fortable to him in his present state, but if
 " God pleases to give him back his five senses
 " whatever I bequeath must be divided in
 " three equal parts; and give him one of the
 " 3 parts; but then as to the three hundred
 " pounds a year, I bequeath that to him be-
 " sides for ever and ever, to him and his exors
 " heirs lawfully begoten, as he was, to me the
 " only obedient and more dutifol to me than my
 " two mentioned sons; I bequeath to my sister
 " Fanny de Killilly, now at Rouen, fifty pounds
 " a year while she lives, and at her death to fifty
 " pounds more to pay her funeral expences.
 " I beques my B. B. P.: Lynch de Killikelly
 " now at Bilboa, one *two* hundred pounds,
 " and forgive him the 9000 R^s. he owes me.
 " I all my juels, plate, linen of all kinds, with
 " all my silk cloaths: furniture of this house,
 " must be sold for as much as can be got for
 " it, not to sell it in a hurry. I leave it in
 " charitable uses, but hope to live to sell it
 " myself be I desire, and give away my car-
 " pit, which my aunt gave me with the sofa,
 " and 12 armed chairs to a friend which I
 " don't name, as it is my will and pleasure
 " so to do; this house, without the furni-

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" ture, I leave to my niece Helen O'Neill
 " for ever, and after her to her daughter
 " Doloxes, if she proves dutiful to her mother,
 " otherwise she may disinherit her, they must
 " never sell it, but must go to one of her sons
 " who shall be most dutiful to her. I leave my
 " two nieces in Lisbon, Mrs. Cusin and Mrs.
 " Cloughan x one hundred pounds each for
 " once, and my niece in Paris, the nun, Helen
 " Moroney 50 pounds once; to Micaela
 " Perez, I leave her 3 reals plate every day
 " while she lives, with mourning for her, and
 " if I have any *other woman* in Clara
 " Ramiro, to pay their wages till the day of
 " my death, and give them *mourning*; to
 " blind Pira 2 reals a day while he lives.
 " I pray that my corps should be buried with
 " my dear aunt, at *the* Capuchins in Alicant,
 " in the vault I got made there myself. If
 " they won't. permit I should be buried there,
 " I desire, at my own expens, to be sent in a
 " decent manner to Galway, in Ireland, and
 " be buried near the place my uncle Peter,
 " the bishop, lies, in the chapel of the Domi-
 " nican friars. In case I shall be buried *there*,
 " bequeath them two hundred pounds for
 " my funeral expenses, and charitable uses.
 " To my faithful serv^t Tomasa Cloreas S^r 20
 " dollars *once*. To her son twenty more *once*.
 " To Tom's nurse 30 dollars once current
 " dollars, and desire my son Thomas to sell
 " every thing that belongs to me in Spain, or
 " any where else, with all *my acc*", and give

" them up clearly and justly to my executors,
 " that they should dispose of every thing that
 " belongs to me as I shall desire or put in
 " writing. As to the lease of this house, I
 " shall dispose of it myself; that my will should
 " be valid in Spain; leave one guinea to the
 " holy house of " Jerusalem." I annull every
 " other will I have wrote myself, or got it
 " wrote by any other person, except this one
 " of this date, which I now write with my
 " own hand,

" I name as my two executors,
 " D^r Manuel de la Torre,
 " Father, & Mr. Frans
 " Archdekin.

CATHERINE MOORE.

" I bequeath my son Peter all I have to
 " leave in this world, for his being to me an
 " obedient and dutiful son, till he became un-
 " sain; and as it is God's he should be so,
 " leave him all I my property,
 " that he should be taken better *taken* care
 " of, and live more comfortably; but if he
 " dies without coming to his five senses, and
 " even if he only gets them at his death, I
 " desire my executors to appropriate all my
 " property I left my son Peter, to be laid out
 " in charitable uses, as

This paper was endorsed

" Mrs. Moore,

" of Alicant.

" Last Will."

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Besides these there was the draft of a will dated Dec. 1810, by which the deceased bequeathed all her property to Thomas Moore, and the following form of a codicil :

E.

The lines round this paper are to shew in what manner the original was found cut.

Form of a Codicil to the Will (if such be intended.)

“ Whereas by my will hereunto annexed,
“ bearing date the day of December,
“ 1810, I thereby give, devised, and be-
“ queathed unto my dear son Thomas Moore,
“ all my real and personal estate, of which I
“ should die seized, possessed of, interested
“ in, or entitled to, subject only to the pay-
“ ment of my debts, funeral, and testamentary
“ expences, and such legacies as I might be-
“ queath by any codicil to be added to my said
“ will. Now I do hereby further bequeath
“ unto [here name the nature and amount of
“ the further bequests, and the exact descrip-
“ tions of the persons to whom such legacies
“ are bequeathed]. And I do hereby declare
“ and direct that all the said legacies be-
“ queathed in and by this codicil to my said
“ will, are and shall be accounted and are
“ charged upon all my estate and effects so
“ devised and bequeathed to my said son
“ Thomas Moore as aforesaid ; and that the
“ same are to be paid by him out of my estate
“ and effects, within after my de-
“ cease. And I do ordain and declare this

“ present writing to be a codicil to my said
 “ will annexed hereto; and that it shall be
 “ taken and accepted as part thereof; and I
 “ do hereby confirm my said will in every
 “ particular thereof, that is not hereby alter-
 “ ed. In witness whereof, I have to this
 “ codicil set my hand and seal, the day
 “ of 18

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Signed, sealed, declared, and pub-
 lished by the said Catherine
 Moore, as and for a codicil to
 be annexed to her last will, and
 to be taken as part thereof, in
 the presence of

(Endorsed)

Copy for a Codicil.

Paper C. was propounded by Mr. Met-
 calf, the committee of Peter Moore.—Paper B. by
 Thomas Moore, who also, in the event of B. being
 pronounced to be cancelled, propounded paper A.—
 George Moore prayed an intestacy.

Mr. EDWARD DARELL *deposed*,

“ That he was at school with Thomas Moore, with
 “ whom a correspondence and intimacy were kept
 “ up, which led to his becoming, in the year 1809,
 “ acquainted with his mother; and that she often
 “ sent to him to talk with her; and he continued to
 “ be acquainted with her till two or three months

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“ next before her death, by which means, as well  
 “ as by declarations of deceased, as long as he was  
 “ acquainted with her, he knows that she enter-  
 “ tained a very particular regard and affection for  
 “ Thomas Moore, and she spoke to deponent as  
 “ having made him her heir entirely of every thing ;  
 “ but with a qualification, as it appeared to him,  
 “ from what she said, that she expected her  
 “ said son would be submissive to her ; and she re-  
 “ peatedly spoke of his elder brother being pos-  
 “ sessed of an ample fortune, by succeeding to his  
 “ family estates in Ireland, on his father’s death,  
 “ and of her being offended with him very highly ;  
 “ and likewise speaking of her other son, Peter  
 “ Moore, becoming deranged, she said all her  
 “ hopes were in her son Thomas ; and she en-  
 “ trusted him with the management of her pecu-  
 “ niary concerns.

“ That from his earliest acquaintance with Mrs.  
 “ Moore, and as long as he was acquainted with  
 “ her, she constantly expressed herself as highly  
 “ displeased with and offended at her eldest son,  
 “ George Moore ; and assigned as reasons for such  
 “ displeasure, his not paying her her jointure, and  
 “ his marriage ; and the deponent engaged him-  
 “ self in or about the month of April or May,  
 “ of the year in which she died, in endeavouring  
 “ to effect a reconciliation between her, and her  
 “ said eldest son ; but he was unable to prevail  
 “ with her on such occasion, and she was not re-  
 “ conciled to him as long as he knew her ; and till  
 “ deponent so last knew her she, the said deceased,  
 “ in his hearing, made use always of the most



“ forcible expressions, purporting to and expressing  
 “ her displeasure against him, and accusing him  
 “ of ingratitude, and various acts of baseness, and  
 “ declaring that she did not, and never could again  
 “ look upon or consider him as her son, and that  
 “ he should never be benefited by any property  
 “ she might leave behind her.

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The same witness answered in reply to an interrogatory,

“ That the deceased did, about the period of her  
 “ said son Thomas going to Spain, in the summer  
 “ of 1812, as well as afterwards, mention to the  
 “ respondent her disapprobation of his inter-  
 “ marrying with his present wife, as not being a  
 “ proper match for him : but the respondent did not  
 “ see or hear from her after the said marriage took  
 “ place; and he knows not, nor has heard, nor  
 “ has ground whereon to believe, that the de-  
 “ ceased was, and uniformly declared herself to be,  
 “ greatly exasperated and offended with him on  
 “ that account, and that she never forgave him, or  
 “ would ever permit his wife or her children, by  
 “ her two former marriages, to see or visit her ;  
 “ save that, previous to the said marriage, she, the  
 “ deceased, made declarations to the respondent,  
 “ that such would be the case, when she talked to  
 “ him to induce him to discourage her son from  
 “ the said marriage.”

Mr. THOMAS LOWTEN, an attorney at law,  
*deposed,*

“ That he was several times in company with  
 “ the deceased, and her son, the articulate Thomas  
 “ Moore, and until some months before her death,

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" and on such occasions, as well as when absent
 " from her, she appeared to have, and by her
 " expressions of him, as he verily believes, had, a
 " very particular regard and affection for him, and
 " until about a month before her death, she ap-
 " peared to him to look upon, and did, as he verily
 " believes, look upon him as the special and pe-
 " culiar object of her testamentary bounty ; and
 " she several times, in his hearing, spoke of her
 " having made, and told him she had made, her
 " said son her sole heir, and left him every thing ;
 " and she dwelt much upon her elder son George
 " having got all the family estates in Ireland, as
 " well as the personal property, which she said she
 " had given him power to collect, but he had not
 " paid her her dower, or the legacies given to his
 " brothers by his father's will, and she said he became
 " possessed of considerable property by the death
 " of his eldest brother, John ; and mentioned her
 " other son, Peter, as becoming deranged in mind,
 " and very often spoke of her being greatly of-
 " fended with the said George Moore.—That, by
 " his acquaintance and intercourse with the said
 " deceased, who used constantly to send her said
 " son, Thomas Moore, to him, he knows that she en-
 " trusted her son Thomas Moore with the care and
 " management of her pecuniary concerns, and he
 " believes that he had the management of every thing,
 " as she appeared not to do any thing without him ;
 " and she did, until about a month before her
 " death, on various occasions, in his hearing, de-
 " clare and express her regard and affection for
 " the said Thomas Moore, and her full confidence

" in him, and she said to him, as late as in July
 " next preceding the month of August, in which she
 " died, that she had made him her heir ; that she
 " did, within the last month of her life, when he
 " was in company with her, say, when speaking of
 " the said Thomas Moore, who was in Spain, that
 " she was surprised she could not hear from him
 " respecting her affairs, after which, within the
 " same month, in a letter in her handwriting, ad-
 " dressed to deponent (the said Thomas Moore
 " having arrived from Spain, and being in London,
 " where he had seen him) she desired him, after
 " what had passed in Spain, not to consult her
 " said son about her affairs; and in conversation
 " she afterwards told him she had heard her said
 " son had been deranged in his mind in Spain,
 " (which he apprehends was what she alluded to,
 " in saying, after what had passed in Spain) and
 " the deponent remonstrated with her on the im-
 " propriety of such her determination, and said how
 " much she would be assisted by him in giving
 " her answer to a bill in Chancery, filed against
 " her by his brother George ; and she at last con-
 " sented that the deponent should advise with
 " Thomas Moore, about preparing such answer ;
 " but requested he would not let him know that
 " she had desired him so to do ; that he remem-
 " bers (but whether within the last month of
 " her life, or not, he cannot say) when she ap-
 " peared dissatisfied with the said Thomas Moore,
 " (and being the last occasion of her speaking
 " of him) in an odd sort of way shrugged up her

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“ shoulders, and said, ‘ I had’ or ‘ I have’ (he cannot say which) given him every thing.”

Mr. ANTHONY GOWER *deposed*,

“ That he had known the deceased nearly forty years.—That shortly before, and thinks it may have been as late as a month next before the death of the said deceased, who was in the habit of frequently calling upon him, that he last saw and was in company with her ; and she, the said deceased, constantly appeared to have, and as he verily believes had, and entertained a great regard and affection for her son, the articulate Thomas Moore, to which he is enabled to depose from the expressions she always, in his hearing, used towards him ; that she did many times say, that she doated on the said Thomas Moore, and that she had made him her heir ; but she did sometime before her death tell him, that she suspected Thomas was going to marry ; and within the last six weeks of her life, but more particularly as to time he cannot depose, she told him he was married, which appeared to displease her ; that in speaking of this she said her said son, whom she doated upon, and whom she had made her heir was married, with which she appeared to be, and was dissatisfied.”

Mr. DANIEL FRENCH, barrister at law, *deposed*,

“ That he was, on several occasions, in company with Mrs. Moore, until the day next before the day on which she died ; that, on the first occasion of sending for him, she signified to him that her said son was going to take some step displeasing

“ to her ; but whether it was his departure for
 “ Spain, or what it was, he, to whom she particu-
 “ larly mentioned such, cannot now from recollec-
 “ tion set forth ; and she did, as he well remembers,
 “ then say, speaking of her said son Thomas, that
 “ he was the only person for whom she had any
 “ love ; and that she had made a will in his favour,
 “ regularly signed and attested, and left the whole
 “ to him, and desired deponent to mention to him
 “ what it was that so displeased her, which he was
 “ going to do, and which deponent did mention to
 “ him, though he now forgets what it was ; and
 “ this deponent says, that at all times that he was
 “ in company with her, and down to the time of
 “ his last seeing her, she appeared to have, and as
 “ he verily believes had, and entertained a very
 “ particular regard and affection for her son,
 “ Thomas Moore ; and she constantly to the de-
 “ ponent expressed and spoke of him as the pe-
 “ culiar object of her testamentary bounty ; and
 “ during the latter part of his acquaintance with
 “ her, when she became displeased with him, said
 “ and declared to the deponent that her son,
 “ Thomas, was still the object of her bounty,
 “ though he had so much displeased her ; and she
 “ did latterly frequently, when he was in company
 “ with her, request him to call on Mr. Butler, the
 “ conveyancer, and desire him to call upon her to
 “ make a new will, and which she so did about a
 “ month before her death ; and on the last day
 “ next before her death, when he was coming from
 “ her house, the Reverend Mr. Garey, a priest,
 “ who attended her at the street door, told him

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“ Mrs. Moore wished him to go to Mr. Butler, and
“ desire him to call upon her. That, until her
“ said son Thomas went to Spain, the deceased
“ entrusted him with the care and management of
“ her pecuniary concerns, and all other business of
“ importance ; and that when he went to Spain,
“ which he did about a year before her death, she
“ entrusted him with her affairs there ; that about
“ a month before her death she wrote a letter, in
“ which she desired deponent to meet her son
“ Thomas, at Yarmouth, on his return from Spain,
“ (where he had been, as he understood, in conver-
“ sation with her, deranged in his mind) and accom-
“ pany him to London ; and soon afterwards, but
“ before he so went to meet him at Yarmouth, she
“ told the deponent she should always be afraid of
“ his losing his mind again, and that he should only
“ live in her house, provided the deponent would
“ live with him ; that the deceased, on various oc-
“ casions, and at different times, declared and ex-
“ pressed her regard and affection for, and full
“ confidence in, the said Thomas Moore, to whom
“ she had, as by him predeposed, said she had left
“ every thing ; and so declared and expressed
“ herself until she spoke as she did to deponent,
“ some weeks before her death, about her son
“ Thomas having become deranged in his mind in
“ Spain, on which her affections appeared alienated
“ from her said son Thomas ; and when she spoke
“ of his being deranged, he was in Spain ; after
“ which time, within two or three weeks next
“ before her death, she several times said and de-
“ clared to the deponent, that she would make a

“ will in such a way as if she had no sons ; and
 “ spoke occasionally against both her sons, Thomas
 “ Moore and George Moore, with great acrimony.
 “ That he has frequently heard her express her
 “ displeasure against George Moore in the most
 “ pointed terms, and declare that she did not nor
 “ ever could again look upon him as her son, and
 “ that neither he nor his sons should be benefited
 “ by any property she might leave behind her.

“ That several times in the course of the year in
 “ which she died, she told him she had made Thomas
 “ her heir, and left him every thing ; that one day,
 “ shortly before her death, she called on the depo-
 “ nent, and he went into the carriage to her, when
 “ she said, ‘ *Now I consider that I have no sons
 “ or relations, and shall make other friends ;*’ and
 “ a few days afterwards she repeated what she had
 “ said on the preceding day, and requested de-
 “ ponent to call on Mr. Butler, the conveyancer,
 “ in order to have a new will, saying, she felt her-
 “ self very ill, and might probably die ; on which
 “ he, from what she said, expressed his horror at
 “ the idea of her bequeathing her property away
 “ from her family ; and saying that no good man
 “ would suffer himself to be benefited by her
 “ bounty at their expence, she replied, she was
 “ determined to act as she thought proper ; and
 “ finding her inflexible, he said to her, at all events,
 “ in case Mr. Butler should not come, I hope you
 “ will do nothing that will in the mean time disin-
 “ herit your family, and leave your property in a
 “ state of eternal litigation ; to which the said de-
 “ ceased answered, No, no, I have taken great care

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" of that matter, though, God forgive me, this
 " morning I very near did something that would
 " have made Tom remember, (or suffer, he cannot
 " say which,) but if I die before I see Mr. Butler,
 " which I think from my pain in my side I may
 " very probably do, there is a will, by which the
 " property will not go out of the family; but really
 " poor Tom is quite mad, and you must live here
 " with him, and we must have at dinner knives
 " that will not cut; and deponent from thence was
 " perfectly convinced, that until the hour of her
 " death, she considered her said son Thomas
 " Moore as the object of her bounty by will; but
 " otherwise he cannot depose to her recognizing
 " any will by her made; that on all occasions,
 " when she inveighed most bitterly against her son
 " Thomas, she uniformly relented towards the end,
 " and gave him to understand that he was still the
 " fondest object of her affections;—that when she
 " heard of Thomas's marriage, she did once or
 " twice declare that her son George's was highly
 " advantageous over Thomas's."

Mrs. ROOKE *deposed,*

" That the deceased had the greatest aversion to
 " her son Thomas's marriage; and he has heard
 " her say, that neither George nor Thomas should
 " be benefited by any property she might leave
 " behind her."

Mr. Thomas Moore, in his answers to the allegation given in by the committee of Peter Moore, *deposed,*

" That the deceased had a small flat deal box,
 " and a small trunk in her bed-room, in both of

" which she kept her money, keys, papers, atemo-
 " randa, letters, and other things ; and that, after
 " her death, the papers marked C. and B. were
 " found by Mr. Lowten in the presence of Edward
 " Darrell, Daniel French, and the respondent, to-
 " gether in the said deal box ; and the paper marked
 " A. was found in the said small trunk."

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*Swabey and Stoddart, for paper C.*

*Jenner and Lushington, for paper B. or paper A.*

*Phillimore and Dodson, for an intestacy.*

#### JUDGMENT (a).

Sir JOHN NICHOLL.

In December 1808, the deceased wrote a sort of temporary will;—for it was clearly made with a view to a more formal instrument. It is merely signed, —not attested,—and from expressions which occur in it, must have been written with the intention of its being the preparation for a more formal will ;—strong terms are used in it ;—and it is written under feelings of great resentment, and for a temporary purpose.

Mrs. Moore's testamentary intentions were carried into more formal effect by the will of 1810 ;—in that will every thing is given to her son Thomas ;—but she forbears to record the reproachful terms against her eldest son, which she had inserted in the other instrument. By the will of 1810 there were

(a) This judgment has been given rather in a compressed form as so much of the evidence has been detailed.—For the arguments of counsel, see the next case.

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no legacies ;—a form of codicil, however, was furnished to her by her solicitor. The will of 1810, not only superseded that of 1808 ;—but was in great degree in execution of it, and represented it, for it was nearly to the same effect. It approaches the case of a draft which a person signs, and afterwards executes a will made from it ; the draft is superseded, being entirely dependent on the will :—if the will is revoked, the draft is revoked also.

If the Court is of opinion that this will was for a temporary purpose,—and that a subsequent will was executed from it ;—the question which has been made as to the revival would hardly arise.—Therefore, I may relieve myself in a considerable degree from going into the cases cited ; though, with respect to those cases, I cannot but observe that there is not, when the arguments come to be examined, much difference between the counsel with respect to the law. Those cases depend each on their particular circumstances. The only difference is, whether the presumption lies on the one side, or the other. For whether there is a presumed revival, or a presumed revocation ; still it is admitted that the presumption, on whichever side it lies, may be repelled by circumstances ; and the case would then revolve itself into a question of intention.

If it were necessary to decide the point, I should hold that it was not the presumption, when B. was cancelled, that A. should revive ;—and supposing the general presumption to be in favour of a revival, I should be most clearly of opinion, that the presumption was repelled, and that it was not the intention of the deceased that A. should revive.

The question then comes to the cancellation of

B.;—the Court must examine the appearance of the instrument itself;—the three sheets were connected by tape, sealed by her own seal, the same seal annexed to the will itself;—the fact is, that some one has carefully cut out apparently with scissars the whole of the instrument or margin, so as to detach it from its frame;—the attestation clause also is cut through.—It is the duty of the Court to put a rational construction on this act. In my judgment, it must have been done for the purpose of cancelling, revoking, and destroying, the validity of this instrument. I can put no other rational construction on the act;—it must have been done not equivocally, but decidedly, for the purpose of revoking the instrument;—the form of the codicil also is cut in the same manner, so that it is not improbable, considering the character of the deceased, that she thought it in some way necessary.

The instrument being presumptively revoked,—the next question is, by whom?—Here there can be no difficulty,—it was found in her own possession,—and it is not suggested that any other person had access to it.

The presumption that the act was done to cancel the instrument may be repelled by shewing that it was done for some other purpose, or by some other person.—Purposes are suggested by the ingenuity of counsel; but it is not enough to suggest; they must be proved. It is pleaded in the eighth article of the allegation, that the act was not done by the deceased, or by any person under her authority;—but the evidence adduced in support of the plea falls short of the averments. Indeed, it

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strongly disproves them, and confirms the presumption of law.

In the first place, paper C. was written in 1812. The deceased then intended a very different disposition,—her son George, who had been excluded by A. and B. under strong circumstances of resentment,—when she wrote C. had been restored to her favour and bounty. It is by no means impossible, that when she wrote C. she might have cancelled B.

Before her death, something of a reconciliation had taken place with her son George, so as to admit him to an intercourse,—though it was not a very cordial one, as the Chancery suit continued.

It is more important to observe, that the confidence which, in 1808, she entertained in her son Thomas, had been a good deal broken in upon ;—her letters have been introduced,—passages have been cited from them which mark her maternal affection ; but there are passages also in these letters which mark her displeasure against this son.

The character of the lady is distinguished by intemperance of mind and capriciousness ; at any time in her life this might have produced a cancellation ;—she was not satisfied with her son Thomas's conduct while in Spain ;—charged him with neglect of her affairs, and considered him as insane ;—after his return, he committed what was, in her opinion, an act of great atrocity ;—he married without taking her advice ;—this was the same sort of circumstance which had induced her resentment against her son George ;—and she declared that she was more dissatisfied with Thomas's conduct than with that of George.

These circumstances would naturally produce an alteration in the disposition of her property ;—the result of the evidence is, that there was great resentment towards her son Thomas,—and it is proved that, till the last moment of her life, she wished Mr. Butler to prepare a new will.

All these circumstances, so far from repelling, confirm the probability that the act was done with intention of revoking.

Mr. French's evidence does not alter the view now taken by the Court ;—she several times told him she had left her son Thomas every thing ;—but on other occasions she said, “ I have no sons or relations,” and desired him to call on her every day ;—shortly afterwards she repeated this,—Mr. French expressed his horror at her bequeathing her property from her family ; but she said, she was determined to act as she thought proper ;—finding her inflexible, he said, “ he hoped she would do nothing to disinherit her family, and to leave her property in eternal litigation.” To which she answered, “ No, no, I have taken great care of that matter, though, God forgive me, I very near did something which would have made Tom remember, or suffer, (he cannot say which,) but if I die before I see Mr. Butler, which, from the pain in my side, I think very probable, there is a will by which the property will not go out of the family ;—but really poor Tom is quite mad, and you must live here with him, and have knives that will not cut.”

In the conclusion which this gentleman (who was not acquainted with other declarations of the deceased) drew from this conversation, it is extremely difficult to concur. By what will, by

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what instrument, and to what extent, was this provided? One day, just before her death, she said Tom was not fit to be his own master;—nothing, therefore, could be further from her intention, than to place the whole of her property under his care and direction, and to make him her executor.

The Court, however, can place little reliance on the sincerity of declarations,—they are very easily misapprehended,—and a trifling word may alter the whole import of them,—and with a person of such a character, and under such circumstances, the declaration mentioned is too loose to be relied upon; and, above all, it would be extremely dangerous to depend upon them in opposition to the acts of the deceased;—she alludes to something she had done that morning,—it may have been cutting B.—or writing C.—or something else.

The declarations,—*that she had no son,—that she must make other friends,*—Mr. French says, *that she was inflexible,*—Mr. French's horror at her intentions.—I doubt a great deal, not what the witness, but what the deceased herself meant;—the Court must scrutinize declarations coming from the deceased, as well as from the witness;—there is nothing to shew that B. was not cancelled after these conversations; from the expression “very near,” though she might not then have done it, she might have done it the next morning;—it has been admitted, that it was impossible to depend one hour upon her conduct;—her passion and caprice were so irregular, that the only conclusion we can come to is, that she had no fixt and determined mind upon the subject.

Here is an act of cancellation,—it must be pre-

sumed to have been done by the deceased,—there is no evidence to shew that it was not done *animo revocandi*; every thing leads to the contrary conclusion. I pronounce against B.

Paper C. has been propounded;—the question is, whether it is a deliberative, or a complete paper;—if it is of the former description, there must be evidence to shew that the deceased was prevented by the act of God from the due execution of it,—it was written on the envelope of a former will,—various interlineations and alterations occurred in it;—it states that she wishes it to be made in the following manner by a “lawer approved,” George and Thomas Moore are struck through,—it leaves off in the middle of a sentence.—The counsel have hardly ventured to argue this as a finished paper, there is a complete departure from all other wills, and its several parts are quite inconsistent with each other;—it could only be sustained by evidence shewing that she had come to a final resolution that this paper should operate as far as it goes,—there is not one tittle of evidence to supply the demands of law in this respect. Mr. Butler was sent for; but what to draw up the Court can form no opinion,—it must be at a loss to conjecture her settled intention. The only conclusion I can come to is, that she died intestate. She might have intended to die testate; but the Court cannot make a will for her,—it is enough that she did not intend either of these papers to operate. I must pronounce against them all:—and for an intestacy.

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MOORE v. MOORE and METCALF (a).

*(An Appeal from the Prerogative Court of
 Canterbury.)*

The Judges who sate under this commission
 were

Mr. Baron RICHARDS,
 Mr. Justice PARK,
 Mr. Justice ABBOT,
 Doctor ARNOLD,
 Doctor ADAMS,
 Dr. BURNABY,
 and
 Doctor GOSTLING.

A mutilation
 of a will held
 to amount to
 a cancellation,
 and that can-
 cellation not
 to revive a
 prior will of
 nearly similar
 import.

*Dr. Phillimore, Dr. Dodson, and Mr. Heald,
 for Mr. George Moore, and in support of the sen-
 tence of the Prerogative Court.*

(a) Paper C. was not propounded in the Court of Delegates; but the committee of Mr. Peter Moore, who had prayed probate of that paper in the Prerogative Court, joined with Mr. George Moore, in praying an intestacy, and appeared by his counsel: after some preliminary discussion, however, the Court refused to hear them, on the ground that there had been some informality in their mode of adhering to the appeal.

The argument necessarily divides itself into two branches:

First, Whether B. is a cancelled instrument.

Secondly, If B. should be held to be cancelled, whether A. does not, by necessary implication, and by construction of law, follow the fate of B.

As to the first point,—we submit that if the testatrix cut B. advisedly, the presumption must be that she cut it *animo cancellandi*.—That from the circumstance of its having been found in her custody, and no other person having access to the box in which it was kept, the presumption must be that she cut it herself.—And, *lastly*, These presumptions are confirmed and corroborated by the character of the deceased, and the state of her affections at the time of her death.

The manner in which B. has been cut, raises the inference that it has been advisedly cut;—the attestation clause was entirely cut through, one of the seals which fastened the different sheets together was broken, and the several papers in their detached state were found scattered about the box.—The rule of the civil law was, that if the testator had mutilated a will himself, the heir could not claim under it; but if it could be shewn that another person had mutilated it, the will was good (a). *Consultò quidem deletà exceptione petentes, repelluntur; inconsultò verò, non repelluntur, sive legi possunt, sive non possunt, quoniam si totum testamentum non extet, constat valere omnia quæ in eo scripta sunt. Et si quidem illud concidit*

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(a) Dig. Lib. 28. tit. 4. c. 3.

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testator denegabuntur actiones : si verò alius, invito testatore, non denegabuntur. The expressions in this passage seem to characterize the very species of mutilation this instrument had undergone.

Such being the appearance the instrument presents on the face of it, a Court of law is bound to put some construction upon the act ;—it will not be sufficient to say that the testatrix, (if such she is to be called,) has done it in sport, or to while away a vacant half hour,—if she did it advisedly, the law will fasten on her the conclusion that she did it *animo cancellandi*..

Again, from the care with which the will was preserved, and from the place of its deposit being accessible to herself alone, the presumption must be, that she cut it herself. Sin de facto testatoris haud quidem liqueat, sed testamentum tamen scriptum domi testatoris, et in arcâ reperiatur deletum, aut incisum ; etiam tunc ex voluntate testatoris id factum præsumatur (a).—Moreover it was found together with paper C., which paper, if completed, must have utterly annihilated it.—In the eighth article of the adverse plea, it is stated, “ *that when paper B. was found after the deceased's death, it was in the same plight and condition as it now appears, and that the cutting off the border or margin of the said paper was not done by the deceased, or any person under her authority or direction, with a view to destroy, cancel, or revoke, the said will ; but that down to the time of her death she recognized, and considered the said paper,—writing B.*

(a) Voet ad Pand. lib. 28. tit. 4.

as her last will and testament." It was extremely essential to have established this fact, and yet no evidence whatever has been adduced in support of this article of the allegation;—by the witnesses examined, and the letters produced, the affections of the deceased at the latter period of her life, appear to have been alienated from her son Thomas. Letters of the 28th of July, and the 10th of Aug. are important in this view, as they embrace the period about which C. was written.

C. too, but for the postscript, would be a finished paper; and in it we read recorded by her own hand, that Thomas was undutiful and disobedient;—he is placed on a level with George, for whom she entertained so deep-rooted an aversion,—and every will she had ever made is annulled.

On this part of the case the character of the deceased is important;—it is impossible not to be struck with the extraordinary features by which it is delineated in the evidence before the Court,—her irritable and anxious mind,—the vehemence of her passions,—her tendency to act strongly and permanently on the impulse of the moment, all paved the way for the misery, vexation, and disappointment, which she was destined to experience in her latter days.—In return for the passionate affection she lavished on her children, she exacted from them implicit obedience and submission to her will;—and above all things, she held that they were bound to consult her wishes alone, in disposing of themselves in marriage;—to a mind constituted like this,—influenced by the fervour of such warm affections,—and liable to the agitations of such stormy

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passions, the transition from ardent love to violent hatred was natural and easy; her eldest son whom she had doated on to such an excess as to excite the jealousy of his younger brothers, had for many years been to her an object of aversion. Is it, therefore, surprising, or inconsistent with the ordinary course of human passions, that her youngest son, when he conducted himself in a manner similar to his eldest brother, should have excited in her mind similar feelings of indignation and resentment?

If we have established that B. was mutilated *animo cancellandi*;—it will be very difficult to maintain, that when she did this act, she did not also intend to cancel A.,—the wills are so essentially identified, that one appears to be little else than the rough draft from which the other was transcribed,—the same person was executor in both, and both contained substantially the same disposition of her property.

But we may carry the argument higher, and assert that by construction of law, A. was destroyed when B. was completed;—and that A. being destroyed, in order to have given effect to it again,—there must have been some act of republication,—or some revival by necessary implication,—or something in short to shew that it was the wish and intention of the deceased,—that her first will should take effect after she had cancelled her second. This is the clear language of the Roman law (*a*). *Posteriore quoque testamento quod jure perfectum sit posterius rumpitur, nec interest, extiterit aliquis hæres, an non,—hoc enim*

(*a*) Instit. Lib. 2. tit. 17. s. 2 de posteriore testamento.

solum spectatur, an aliquo casu existere potuerit. Idéoque si quis aut noluerit hæres esse, aut vivo testatore, aut post mortem ejus, antequam hæreditatem adiret, decesserit, aut conditione, sub quâ hæres institutus est, defectus sit, in his casibus pater-familias intestatus moritur. Nam et prius testamentum non valet, ruptum à posteriore; et posterius æque nullas vires habet, cum ex eo nemo hæres extiterit. In the same book of the Institutes under the head of quibus modis conualescit testamentum there is a further illustration of this doctrine (a). All the commentators have concurred in the sense and stringency of these passages;—the expressions of Vinnius are, nec prioris testamenti sublatio pendet ab eventu aliquo, aut casu contingente post mortem testatoris, sed illud *statim* vivo adhuc testatore *ipso jure per posterius rumpitur*.

This doctrine will be found also in the Digest Lib. 28. tit. 3. s. 2., and in several passages of the code (b);—and it was carried so far, that if a man, having made his will, was adopted into another family, and afterwards became emancipated, it was necessary that there should be some act to revive the will (c).

We are not, however, driven to stand on the extreme of this principle;—in looking to cases, we may anticipate that that of *Goodright v. Glazier* (d) will

(a) Instit. Lib. tit. 17. s. 7.

(b) Tunc autem prius testamentum rumpitur, cum posterius jure perfectum sit.

(c) Dig. 37. tit. 11. c. 41.

(d) *Goodright on the demise of Glazier v. Glazier*, Burrows, Vol. IV. p. 2,512.

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probably be pressed against us: it may be observed, however, that the decisions in that very case admit that, under circumstances, the first will, though found entire, might have been held in law to be cancelled;—both Lord Mansfield, and Mr. Justice Yates, admit that such a case might exist; but whatever may be the weight and authority of Glazier's case in Courts which are bound up by the decisions of the Courts of King's Bench, here we can only look to it as expressing the opinion of wise and enlightened judges, as to the law which rules in the disposition of real property;—here it cannot be considered as having any binding authority,—for here we have in the records of this very Court an uninterrupted series of decisions for upwards of a century, flowing in a contrary course.

In *Whitehead v. Jennings* (a). Anthony Keck made his will in Aug. 1701; in 1712 he made another of a totally different tenor, in which his nephew was appointed executor and residuary legatee;—in an access of passion against his nephew, he burnt the latter will,—he afterwards became reconciled to him, and sent for Mr. Tolson, his attorney, to make a new will;—before the attorney arrived, he was taken suddenly ill, and died in the course of the night, calling anxiously for him. The will of 1701 was propounded; but the Court pronounced for an intestacy.

In *Burt v. Burt* (b), a will made in 1669 was found in the closet of the deceased it was pleaded; and proved that he had made another will in 1713;

(a) *Whitehead v. Jennings*, Prerog. 171. Deleg. 1714.

(b) *Burt v. Burt*, Prerog. 1718.

—the only account given of that will was, that the wife said she had destroyed it, having found it in a cancelled state ;—she was materially benefited under the existing will, and the Court pronounced for an intestacy.

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In *Helyar v. Helyar* (a). Robert Helyar died in June 1751, a bachelor, leaving Joanna Helyar a sister, William Helyar his nephew, and two neices ;—by a will of Feb. 12, 1742, he bequeathed to his sister the moiety of a small estate they possessed together in joint-tenancy in Cornwall, and 2000*l.* in money. All his other estates and property he left to his nephew, whom he constituted also his executor and residuary legatee ;—he declared to his solicitor, that his object was to keep the real estates in the male line of the family. —The nephew made his will on the same day, by which he left his property to the uncle, and they exchanged copies of their wills ;—afterwards the nephew married, and had a son ;—his uncle's affections became alienated from him, and in process of time he completely quarrelled with him, and declared he should never be benefited by him ; and, accordingly, on the 19th of Dec. 1745, he made another will, in which his sister was executrix and residuary legatee in the stead of the nephew ;—that will was not found at the death of the deceased ; and it was established to the satisfaction of the Court, that the deceased had destroyed it himself. The case was argued at great length before Sir George Lee ;(b)—five points were

(a) *Helyar v. Helyar*, Prerog. 1754.

(b) From the manuscript notes of Sir Geo. Lee. see p. 166.

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made in favour of the will of 1742.—*First*, That it was contrary to the statute of frauds to receive parole evidence of a will which did not exist.—*Secondly*, That there was not sufficient proof of the factum of the second will.—*Thirdly*, That the executing a second will was not of itself a revocation of the first.—*Fourthly*, That there was proof that the second will was destroyed by the testator himself.—*Fifthly*, That if the second will was destroyed, no act of revival was necessary to set up the first.—Sir George Lee, however, decided against the will propounded, and pronounced Mr. Helyar to have died intestate, expressly on the grounds that the execution of the second will was a revocation of the first ;—and that where a second will had been destroyed, some act of revival was necessary to set up the first.

In *Arnold v. Hoddie (a)*, the deceased made a will in 1753, in favour of a Miss Arnold, whom at that time he was about to marry,—he afterwards quarrelled with her ;—in 1760, he made another will, by which he bequeathed his property to a sister ;—the latter will was not found at his death, nor was there complete proof of the execution of it ; but his aversion to Miss Arnold was proved, and Sir George Hay pronounced against the existing will.

As to the effect of these cases we do not mean to contend, that under all circumstances, when a second will is destroyed, one anterior in date cannot revive ; what we maintain is, that we have so far adopted the civil law into our decisions as to con-

(a) *Arnold v. Hoddie*, Prerog. 1765.

sider the factum of a second will as a presumptive revocation of a first, and that the burthen of proof is by such a circumstance thrown on the adverse party to repel that presumption. On the other hand, where circumstances have been such as to shew clearly that the deceased intended the first will to revive,—these Courts have pronounced for them, as in *Stacey v. Dickens* (a). *Vanier v. Hue* (b), and in the latter case of *Passey v. Hemming* (c); but it has been only in cases where the intention has been satisfactorily made out, that the presumption of law has been held to be repelled. The present case is stronger in its circumstances than either of those which were successively decided by Sir Charles Hodges, the Delegates, Sir George Lee, and Sir George Hay.

For the purposes of this argument, the cancellation of B. is a strong circumstance against A. The writing of C. is a powerful argument against A.,—the declarations of Mrs. Moore that “*she would make her will as if she had no sons,*”—that “*Thomas and George should never inherit her property,*”—her refusal to see Thomas Moore’s wife,—her indignation at his marriage,—her sending for Mr. Butler to make a new will when she was dying,—are all strong circumstances to shew *quo animo* B. was cancelled,—and that by cancelling that paper, it never could be her intention that A. should revive.

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Mr. Warren, counsel for Mr. Thomas Moore, contra.

The *first* question undoubtedly will be, whether B. is cancelled;—the *second* will be whether, if B. is cancelled, A. is in force,—i. e. whether B. which is originally upon the face of it a perfect will, has been, by any thing which has happened to it since, cancelled; and if so, whether by cancelling B., paper A. is revived, and is to all intents and purposes the same as if B. had never been made.

To say that B. is cancelled on the face of it, is very much to overstate the case;—no case,—no decision, has been adduced in support of this assertion: if this is to be decided by bare inspection, let us look to the rules which Swinburne (a) lays down on this head. “*The third case is when the whole testament is not cancelled or defaced, but some part thereof only rased, blotted, or put out; for the other parts of the testament do remain firm and safe, as they were before, although the deletion were in the chief part of the testament, namely, the assignation of the executor.*”

If, therefore, a testament were drawn over with lines, there can be no doubt but that it must be considered as cancelled; so if it were drawn over with cross lines diagonally, in either evidence to repel the presumption, there must be evidence to shew that the party did not mean to deface it.—Here there is nothing crossed, or blotted out;—if, instead of this will being cut, a line had been drawn along the top, passed down the side, and through the attestation clause; could it be contended that the

(a) Swinburne, Part VII. s. 16. p. 515.

will was cancelled on the face of it,—for there is no difference between the act of a knife, and the act of a pen;—it is material whether it be a cancellation *prima facie*, or not;—if it is not, unless there is sufficient evidence to shew that the party intended to cancel it, it remains a good will. Suppose again, this margin not to have been found; and that the will had been found without it in the drawers of the testatrix where she usually kept her papers of consequence; could it be said she did not keep it as her will?—if she did not, why was it there?

Our opponents are not entitled to ask the reason why she cut the paper, for the paper is in itself perfect as a will; they, therefore, are to shew that this was done *animo cancellandi*;—cutting through the attestation clause cannot be of more importance than cutting through the name of the executor; and we have seen in what light Swinburne regards that when he states that, though you cut out the designation of the executor, still the will is good.

Per Curiam. Mr. Justice Abbott,

“Blot out,” not cut out.

Mr. Warren,

“Erase, blot, or put out.”

Per Curiam. Mr. Justice Abbott,

“Erase does not apply to cutting out.

Mr. Warren,

“In whatever way it was done, it would not alter the argument;—evidence may be given to shew for what cause it was done; but whether cut, or drawn round with a black line, it can make no difference. We can only say there are many things done for which we can give no account.

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If, however, it should be held that there is something on the face of this paper which we are called upon to explain, then we have abundant evidence to shew that she did not intend to cancel it.

Bibb v. Thomas (a), was a case in which circumstances were equally strong as here ; there evidence was brought by the heir at law, who claimed against the will, to shew the intent with which the act was done.—If the Court is of opinion that explanation is necessary, the letters, and the evidence supply it : in the former we see the language of a mind in a great degree subsiding from the anger she had once felt towards her son ; and there are a variety of instances in them, as well as in the depositions, where she speaks of him with great affection.

The next question is, supposing B. to be cancelled, what is the effect of that cancellation upon A. ?—And this is a question of great importance,—of great extent,—and of considerable nicety, in consequence of the cases which have been cited. In *Goodright v. Glazier (b)*, the same argument was used, which has been used by my learned friend on the other side ; but it was over-ruled by the Court.

There is no doubt but that the repeal of a subsequent statute sets up a preceding statute.—This is a law as old as any in the country, and why ? because the act which shewed the change of intention is removed by a subsequent act. It is difficult to conceive how these two cases are to be dis-

(a) Blackstone's Rep. Vol. II. p. 1043.

(b) *Goodright on the Demise of Glazier v. Glazier, Barrow*, Vol. IV. p. 2512.

tinguished. What is supposed to repeal the first? Undoubtedly the second.—But then it is argued, the second will shews a change of mind;—to be sure it does,—it shews there was a change of mind at that moment. But does not the destruction of the second instrument shew a change of mind again? —As altered, it is to take effect if the party does not change that will,—and that is the distinction. His mind is shewn by the expression in the second will, if he does not cancel that. The will is ambulatory, and so it is no evidence of a change of intention so as to affect the former will; and this appears to have been the opinion of Lord Mansfield, and, as Mr. Justice Yates says, “*a will has no operation till the death of the testator*, it is the expression of a man’s mind to take place after his death;—as long as he lives he may alter his opinion. I tear the paper which expresses my sentiments,—then, has not my mind reverted?—he has revoked the revocation,—and his mind comes back to its first intention.”

In *Harwood v. Goodright(a)*, Lord Mansfield says, “*it is settled, that if a man by a second will revoked a former, yet, if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived.*” Lord Mansfield, speaking the sense of the Court, considers this as a clear established rule at Common Law.—It stands upon the authority of these two cases.

Per Curiam. Mr. Justice Abbott,

That would go a vast length;—if you put it as an absolute proposition at law without any de-

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duction, that the cancellation of the second will revives the first.—Suppose a man, having a wife and one child, should make a will, leaving his property in a manner suitable to the then state of his family, —that he should afterwards have six children born, and then should make a will, which he should afterwards destroy. By setting up the first will, you would leave five of the children unprovided for.—If you put it as an absolute proposition, that the cancelling of the second will would revive the first, cases might be put so distressing as to make one feel a little whether it was right.

Mr. Warren,

Your lordships will do me the justice to recollect that I have only cited authorities.

Per Curiam. Mr. Justice Abbott,

Certainly; and I put the question to you that you may fortify your opinion by reason as well as by authorities, if you can.

Mr. Warren,

I presume to go no further than the authority of those cases, which certainly do lay it down as a decided principle of law without limitation.

Per Curiam. Mr. Baron Richards,

But I think I may venture to say it has not been universally so considered.—It is a great misfortune, that dicta are taken down from Judges, perhaps incorrectly, and then cited as absolute propositions.

Mr. Warren,

I do not apprehend there can be any mistake in the report: when Lord Mansfield mentions it, he does not say it is decided in such and such a case; but he considers it as a point perfectly established.

Per Curiam. Mr. Justice Abbott,

It certainly in the report is put as the settled law, excluding all question of intention.

Mr. Warren,

If it is the law, therefore whatever inconvenience may arise from it, it must remain the law, till it is altered by the legislature, and nothing short of an act of parliament could do this; and, even admitting that possible difficulties may apply to this rule of law, this is not that kind of case which would call upon the Court to depart from the rule on account of any peculiar hardship.

In *Wright v. Netherwood* (a), Sir William Wynne observed, “the point seems a good deal like that which has been a *vexata quæstio* in these Courts, and brought before the Courts of Common Law, whether a will, which is revoked by another, is set up by the destruction of the second.” So that Sir William Wynne coming many years after Sir George Lee, considered it as a *vexata quæstio*; —the decision, therefore, in *Helyar v. Helyar*, could not have set the question at rest. “There was a case to that effect,” he says, “before Sir George Lee, *Helyar v. Helyar*, in which it was held that the will being once revoked, remained so: but there was an appeal from that judgment to the Delegates, and it was never determined by them; the case of *Glazier* was directly contrary to that, and it was held that the first will was good.” If, therefore, there was any meaning in words, he thought the latter decision the correct one. Supposing this case sent before a jury to decide, there can be no doubt but that, on the authority of the

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(a) *Wright v. Netherwood*, Prerog. May 6, 1793, Reported in the Notes of Mr. Evans's edition of Salkeld, Vol. II. p. 593.

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cases cited, they would find for the will : but then, says my learned friend, the Ecclesiastical Law is different;—you cannot have the personalty;—it may be a very good law for the realty, but it is a very bad one for the personalty.—This appears a strange proposition : there is no difference in the facts,—nor in the conclusion. It cannot be said, that a different conclusion is to be laid down as matter of law, there being nothing but the simple fact, that one relates to a landed, the other to personal estate. What is the ground of Sir W. Wynne's opinion in *Wright v. Netherwood*, that Helyar's case was wrong? Why? because the Court of King's Bench had decided the contrary;—indeed, if this is the law, as I apprehend from these cases it clearly is, in the Court of King's Bench, it must be the law in the Ecclesiastical Court : it is impossible there can be one law applying to real estate(*a*), and another to personalty. Moreover in this Court *Passey v. Hemming* is directly in point in our favour.

Lastly, parole evidence cannot be admitted to affect paper A. There may be parole evidence to affect B. I admit it, because there is something on the face of B. requiring explanation :—but suppose B., cancelled, what is there on the face of A. requiring explanation?—A. is a perfect will;—and if it had been the only paper in existence, there could have been no question about it; and, under the Statute of frauds, no parole testimony can be given under to affect A. Stat. 29 Car. 2. c. 3. s. 22(*b*). If parole testimony is admitted, it must

(*a*) *Passey v. Hemming*, Prerog. 1808. Deleg. 1812.

(*b*) “ And be it further enacted, that no will in writing concerning any goods or chattels, or personal estate, shall be re-

be in direct violation of this clause. Upon the face of the will all has been regular. Then no evidence can be given ; if it were otherwise, verbal evidence might set aside a written will, and do all the mischief the statute of frauds was enacted to prevent.

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*Dr. Jenner, Dr. Lushington, and Mr. Taddy,
on the same side with Mr. Warren.*

With respect to the cancellation, reliance has been placed on a passage from the Digest ; and it has been argued, that the word *concido* expresses exactly the species of mutilation which this paper has undergone : but when we come to look for the meaning of this word in dictionaries, we find it is that which least expresses the appearance of this paper ; for it means to *cut in small pieces, to tear to pieces*. In the dictionary of Ainsworth there are five meanings, one metaphorical, the others go to the complete destruction of the thing, to chop, to mince, to hurt, to ruin, or utterly destroy, *i. e.* if you find that the deceased has done an act which shall destroy the effect of the instrument, or the material upon which that instrument is written, then you may presume it to be a revocation, or act otherwise. Four modes of cancellation are pointed out by the statute of frauds,—by tearing, burning,

pealed ; nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same, in the life of the testator, be committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at least." 29 Car. 2. c. 3. s. 22.

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cancelling, or obliterating (a): the act, therefore, which is to cancel an instrument, must be such a one as shews an intention on the part of the deceased, that that instrument shall not have effect; it must be an act that at the time of doing it shews that it was the intention of the deceased that the instrument should be destroyed by the act then performed upon it;—this is the meaning of the methods found out by the statute of frauds for destroying a will of landed property. Those cited from the civil law, are to the same effect; they imply that there shall be an act done not equivocal in itself, but which shall necessarily import an intention to destroy the instrument to which the fact is applied.

The substance of the paper remains complete; the greatest care has been taken that not a syllable of it should suffer from the act: it is true that, in cutting it, the attestation clause is cut through; but this is clearly not advisedly done; it was upon the second sheet of the will; it is the effect, therefore, of accident, and not of any intention to cut through

(a) “No devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time after 24th of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating, the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated, by the testator, or his directions, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same.”—Stat. 29 Car. 2. c. 3. s. 6.

the essential part of the instrument itself. This is further confirmed by her not having cut through the attestation clause of the codicil;—if the act is at all equivocal, the burthen of proof is on those who impeach the validity of the instrument, to shew that it was done *animo revocandi*, and that proof must apply most strictly to the act itself.

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The other point of the case of extreme importance, and one upon which a decision on the point would be highly desirable, not only in this, but in all courts where questions concerning wills are agitated. We maintain that, according to the principles of this, as well as of the Temporal Courts, a paper revoked by the execution of a subsequent paper is, by the cancellation of that subsequent paper, revived. The case of *Glazier v. Glazier* has established the law on this point: during the discussion of *Passey v. Hemming*, Mr. Justice Heath produced a note he had himself taken in Court of the judgment in *Glazier's* case, which carried the doctrine further than the case as reported in Burrows, does.—A statute which has been repealed, by the repeal of the repealing statute becomes operative again; and upon general principles it must be so held that the suspension of a second act revives a former act.

Per Curiam. Mr. Justice Abbott,

Put this case,—a will giving an estate to trustees for the benefit of A., with some few legacies. Let the testator make a second will giving that estate to A. and B. in joint-tenancy;—suppose B. to die, and several of the legatees,—the effect of the instrument will be the same upon an estate of some thousand pounds, with the exception of some few hundreds;

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—would you say, that the destruction of the second will is to set up the first;—the generality of the principle would rule that. *Glazier's* case comes near that;—and if you compare it to the repeal of a statute, you must go to that extent.

Argument resumed.

The doctrine of the Ecclesiastical Courts does not go to that extent undoubtedly.

With respect to the authorities from the Digest, they have nothing to do with the subject; they have no bearing upon it;—our's is not the civil law of Rome,—our proceedings are grounded upon the *Jus Gentium*;—rules proper for the Roman people would be improper for a country like this;—we all know the solemnity with which wills were executed at Rome. The civil law said that, when once a will is perfected, there it must remain; in many instances it could not be revoked, it was not ambulatory, the principle was the opposite of ours.—With us, no testament can be of effect till after the death of the testator;—we are, therefore, to appeal to common law, and not to civil law, for authority.

In *Jennings v. Whitehead*, it appears that the deceased had told Mr. Tolsen, his solicitor, that he had a will in his possession, which was not to his mind;—that he was reconciled to his nephew Richard, and meant to give him 2,500*l.* in Hampshire. It is a case too, in which the whole tenor of his life, subsequent to 1713, shewed that the person he had once made executor and residuary legatee was never meant to be so again; it was pronounced an intestacy, because there was evidence to shew it could not be his intention by the

revocation of the second will to revive the first; the intention was clearly shewn to be contrary.

In *Burt v. Burt*. The only evidence as to the destruction of the second will was, that of the wife, by whom the destruction had been made; it is impossible, therefore, that there could be any evidence to shew that it was his intention that the first will should revive.

In *Arnold v. Hoddie*, when the instructions were given for second will, the first will and a codicil were in the hands of an attorney, and the testator had no opportunity of cancelling them; circumstances shewed that it was impossible he could have meant the will to revive.

In *Helyar v. Helyar* (a), Sir George Lee's judgment cannot be taken as a decision upon the law that an act is necessary to revive? Whatever may be his opinion, he does not decide that; he con-

(a) In the mention which is made of this case in the report of the case of *Goodright v. Glacier*, Burr. 4. 2512. Sir George Lee's judgment in *Helyar v. Helyar* is erroneously stated to have been affirmed by the Delegates,—the fact being that the case was compromised in the Court of Delegates, and consequently did not come to an hearing there. In the manuscript notes of Sir George Lee, after the recapitulation of the grounds of his judgment, I find the following memorandum :—N. B. “Mr. William Helyar has appealed to the Delegates, and prayed a commission of Lords Spiritual and Temporal: but, on hearing counsel, Lord Chancellor granted it only to judges and civilians, because the questions in the cause turned upon points of law.—The cause was afterwards agreed, and Mr. Helyar renounced his appeal, and consented that the cause should be remitted back to the Prerogative Court, and upon the remission being brought in, I decreed administration to the sister and only next of kin, on the 19th of January, 1757.”

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siders all the circumstances as material. The case of *Helyar*, therefore, only goes to this, that circumstances are material to shew intention; and Sir George Lee would probably have decided differently, had the case of *Glazier* been then decided.

*Wright v. Netherwood* shews Sir W. Wynne's opinion.

*Passey v. Hemming* has however, as it has been generally understood, entirely disposed of this question: it unfortunately happens that we are in the dark as to the grounds of the decisions in this Court; but it is reasonable to conclude from that judgment, that some act or declaration is necessary, in the case of a subsisting will, to shew it was the intention that it should not revive. The will established was in 1780;—the testator died in 1807;—it consisted of two separate papers, written within a short period of each other;—they were attested only by two witnesses, and consequently were not good to pass real estates;—he had made subsequent wills, and to a late period of his life was occupied upon another will, which contained a different disposition of his property; but it was unfinished. The will of 1780 was found in a drawer in a garret, and there was nothing to shew that they had ever been recognized by the deceased. Sir W. Wynne said, he should have felt extremely unwilling to have been bound to have pronounced against them; but he was not: he considered *Helyar's* as a case of circumstances from which it was impossible to believe that the first will contained his last intention,—a departure of intention had been shewn by the variation in the second will, and that variation was proved

not by mere circumstances, but by the execution of the second will.

In another point, this case essentially differs from all those in which the subsisting wills have been held to be void; namely, that in all of them there have been different executors, in the second will from the first;—a circumstance strong to shew a complete change of intention;—here the executor is the same under both instruments.—It is remarkable that all the finished wills in this case shew continued affection towards the same person, and this is not contradicted by any act of the testatrix, shewing any intention to dispose of her property in a manner injurious to him. There has not been any act established under her own hand, as an operative will, indicating a change of intention.

The law of the Ecclesiastical Court is, that there may be evidence given that it was not the intention of the testator that the first will should be revived by the cancellation of the second;—but that, if such evidence is not produced, the presumption must be, that he meant to revive the first. The operation was only suspended by the factum of the second will; and the moment the second will is cancelled, that suspension is taken off.

*Dr. Phillimore in reply.*

Important as the case is on account of the principle of law it involves,—the importance of it has been augmented by the course of argument adopted on the other side;—it has been contended,

*First*, That if B. is a cancelled paper, we are precluded by the statute of frauds from entertaining any question whatever with respect to the

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validity of A.—*Secondly*, That if the Court of King's Bench would pronounce for A., the Court of Delegates is bound to do the same.—*Thirdly*, That the Digest has nothing whatever to do with the question.—If either of these objections are founded, we must be content to admit that there is an end of the question at issue. It is essential, therefore, that they should be set at rest.

Parole evidence is not introduced here to revoke a written will;—but to prove a fact, *viz.* whether A. is a will or not. The evidence is introduced not to revoke A., but to shew that B. had ceased to be a will;—cases of this description have been held not to fall within the statute of frauds; and the practice of the Prerogative Court has, ever since the passing of that statute, been to establish unfinished and unexecuted papers, whenever it can be shewn that it was the intention of the deceased continued to the latest moment of his existence, that they should operate, even in cases where the most regular and formal wills have been found entire and uncanceled.

The objection is not new;—we find from a note of the judgment in *Helyar v. Helyar*, in the handwriting of the eminent judge who decided it, that a similar objection was pressed in that case to any inquiry being made into the factum of an existing will;—“but,” to use his language, “*the case(a) of Sellars v. Garnet in the Prerogative, October 1748, was full to this point; for there an executed will was held to be revoked by a will wrote while*

(a) Cited from Sir George Lee's manuscript notes. In the case of *Helyar v. Helyar*, Prerog. Jan. 8, 1754.

the testator was alive; but he died before it was brought to him, and the contents thereof were proved by witnesses who heard him give the instructions agreeable to what was wrote down. It was insisted that this parole evidence could not be received; that it was to revoke a written will by parole only, contrary to the statute; but both Dr. Bettesworth in the Prerogative, and the Delegates who affirmed this sentence in 1751, were of opinion that it was a will in writing, that the parole proof of the instructions ought to be received, and that it was not a case within the statute of frauds."—This was the doctrine held in 1751; and subsequent practice has established and confirmed it.

The second point made against us is, that if it could be shewn that the Court of King's Bench would hold paper A. to be a will;—this Court would be bound to establish it, inasmuch as it never can be said that there is one law for personal, and another for real property. To this we reply, that the Court of King's Bench has no authority whatsoever over the decisions of this Court. The argument, if good for any thing, would go to constitute it as a Court of Appeal from the Ecclesiastical Courts. If so,—for what purpose is the Court of Delegates convened, by commission under the great seal, to hear all appeals made to the king by virtue of the statute of Henry VIII. ?—and why is a still ulterior tribunal by a commission of review sometimes opened to suitors in this Court?—The Ecclesiastical Courts exercise an independent jurisdiction in all cases over wills of personal property:—the law they administer, from whatever

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sources derived, is incorporated into, and has for centuries formed part of, the established law of the land ;—the Court of Delegates is to them a Court of *dernier ressort* ; the rules of law, and the decisions which have been handed down to your lordships by your predecessors here, are to be the sole guides of your sentence.—The evil and inconvenience arising from the diversity of testamentary law in the Temporal and Ecclesiastical Courts is imaginary ;—the diversity exists to a great extent already ;—the will which can pass personal property to the greatest amount which the talent and industry of a British subject can accumulate it, may have no effect, and in practice frequently has none, over landed property ; while it is valid with respect to one, it is a perfect nullity as to the other.—Indeed, if it were permitted to us to look to the policy of a diversity of this kind in the administration of the testamentary law of England, we should confidently maintain that it was wise, politic, and well adapted to the mixed interests of the opulent and commercial country in which we live, that there should be a greater facility in disposing by will of personal than of real property But this difference exists on great points of every day's occurrence ;—what evil then can result from it on a point which can only arise for decision now and then in the course of a century ? It is sufficient, therefore, only to state on this part of the case, that if it can be made out satisfactorily that, according to the course of decisions in the Ecclesiastical Court, this lady would have been held to have died intestate, the Court of Delegates is

bound to affirm this sentence; and that, even though cases might be cited from Courts of Common Law leading to a directly contrary conclusion.

Thirdly, The assertion that the Digest has no bearing on the subject, could only have been resorted to under the conviction that it was impossible to open the Roman Code without being overwhelmed by the force of the authorities which pressed against the argument of our opponents — The position is novel to the extent, at least, to which it has now been laid down;—the civil law is not the text law of the Court in all instances; but it is positively so where our own law is silent: and beyond this, the whole of the testamentary law which we administer has its basis in the civil law; and, without an intimate knowledge of the Roman code, it would be impossible to acquire a knowledge of our practice, or understand the principles of our decisions.—To illustrate this, by an example familiar to every one:—the birth of children by the Roman law amounted to the revocation of a will; we have not adopted it to this extent; with us marriage and the birth of a child amount to presumptive revocation of a will;—can any one be heard to maintain that we have not adopted our rule from the civil law?—What was the conduct of Lord Camden (*a*), when a question of this sort came before him?—He directed an issue to Sir George Hay to try the question, because the Civil Law Courts were best competent to expound the

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(a) *Shepherd v. Shepherd*, T. R. p. 51.

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law on this subject ;—so it is in this case,—by the Roman law the cancellation of a second will *ipso facto*, revoked a first ;—with us a second will cancelled, is a presumptive revocation of a first ;—we do not push the argument further than this,—we admit that the presumption may be repelled by circumstances. That the civil law has always been considered as the basis of the law of the Ecclesiastical Courts, we have only to refer to the dicta of Sir George Hay (*a*), Lord Camden, Lord Mansfield (*b*), and Sir George Lee, which occur in the several cases which have been cited in different stages of the present argument.—But it has been argued that the civil law is diametrically opposed to the testamentary law of England in principle ; because, by the civil law, a will took effect in the lifetime of the testator, and was not ambulatory ;—once made it could not be revoked,—the testator himself had not the power of cancelling it ;—it happens, however, unfortunately for this observation, that the maxim which is described as so peculiarly characteristic of the English testamentary law,—is a fundamental maxim

(*a*) It was further objected, that by the Roman law, by which we proceed in this Court, the birth of children operated as the revocation of a preceding will. I agree that this is rightly stated from the Roman law,—and that the *Roman law*, in general, guides our decrees ; but it guides our decrees no further than where it is uncontradicted by the English law.—*Sir George Hay's judgment in Shepherd v. Shepherd*, T. B. p. 51.

(*b*) Though, as to personal estate, the law of England has adopted the rules of the Roman testament ; yet, a devise of lands in England is considered in a different light from a Roman will.—*Lord Mansfield's judgment in Harwood v. Goodright*, Cowper's Report, p. 1791.

of the Justinian code (a), and was transplanted from the Digest into the law of this country.

With respect to the points more immediately under discussion; it has been laid down broadly that, under all circumstances where the second will is cancelled, the first will must as it were *ipso facto* revive. Would this be a rule consistent with reason? Would it be desirable on grounds of public policy and justice, that a rule of this description should be stern and unbending,—that there should be no limitation to this doctrine,—no qualification of it, whatsoever? Cases of extreme hardship will suggest themselves readily; cases in which the intention of the testator (the only sure guide for all Courts of testamentary law) might be obviously defeated by such a rule. Let us suppose for instance, that the cases of *Whitehead v. Jennings*, and *Arnold v. Hoddie*, had come before the Court of King's Bench, with a full developement of all the circumstances which were laid open to the Ecclesiastical Courts;—and can it be contended that in either of those cases the Court of King's Bench would have felt itself bound to have decided in favour of the subsisting wills? And yet it has been pressed, on the authority of *Goodright v. Glasier*, that the law is ab-

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(a) Quomodo circa fideicommissa solemus vel in legatis, cum de doli exceptione opposita tractamus, ut sit ambulatoria voluntas ejus usque ad ultimam supremam exitum. Dig. Lib. 24. tit. 4. c. 4.

Quod si iterum in amicitiam redierunt et poenituit testatorem prioris offensæ; legatum vel fideicommissum relictum reintegratur: ambulatoria enim est voluntas defuncti usque ad ultimam supremam exitum. Dig. Lib. 24. tit. 4. c. 4.

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solute and unalterable, and cannot be changed but by an act of parliament.

In *Glazier's* case the will destroyed, and the will subsisting, benefited the same person; and there does not appear to have been before the Court one single circumstance to shew that the deceased had in the slightest degree varied from the affection he entertained for the person to whom he had bequeathed his estate.

In *Harwood v. Goodright*, the doctrine goes no further than this, that a subsequent will, though it be found to contain a different disposition from a former will, yet if the particulars of that difference are unknown, cannot operate as a revocation of it.

If we have been successful in shewing the civil law is to guide our decisions,—our argument remains untouched;—since it is clear both from the text law, and the writings of the best commentators, that there can be no doubt as to the language of the civil law on this part of the case;—the passage before alluded to from the commentary of Vinnius, embraces the whole argument. “*Fingamus (a) rursus testatorem, testamentum quod secundo loco fecerat, ac perinde quo prius ruptum erat, incidisse.—Quæritur an restituatur prius, cujus tabulæ integræ manserant? Papinianus respondit, si id hoc animo à testatore factum sit, ut priores tabulas supremas relinqueret: voluntatem quæ defecerat recenti iudicio rediisse et posse secundum tabulas priores bonorum possessionem pati. At inquires an non sic testamentum citrà*

(a) Vinnius in *Instit.* lib. 2. tit. 17. s. 6. c. 2.

ullam solennitatem nudâ voluntate constituitur? Negat hoc jurisconsultus atque hanc objectionem sic removet, ut dicat, non quæri hic de jure testamenti, sed de viribus exceptionis, quo significat, recenti isto judicio, et simplici voluntate testatoris non constitui novum testamentum; sed si scriptus priore testamento hæres agat, et hæreditatem vindicet, eique objiciatur exceptio mutatæ voluntatis, posse eum hanc exceptionem elidere replicatione voluntatis reversæ, si constet, testatorem hoc animo, posterius testamentum, incidisse, ut prius iterum valere vellet.”—Throwing the burthen of proof therefore completely on the party setting up the instrument, and exacting from him some act to shew that it was the intention of the deceased that the first will should revive.

Per Curiam. Mr. Justice Abbott,

The concluding sentences of the passage you have referred to, seem to me to make very strongly for your argument,—stronger even than those which you have cited: “utique enim hic animus, ab hærede scripto, omninò probandus est, per codicillos putà, aut alias literas, quibus testator palam declaraverit, se velle priores tabulas valere, alioqui eum, tanquam quem utriusque voluntatis pœnituerit intestatum potius decedere voluisse interpretabimur.”

Argument resumed.

Other passages might be cited to the same effect.—From them the law of this Court is deducible. The practical operation of it has been established by a series of cases occurring at intervals from

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1714 to 1765. It has been admitted that no decision has occurred on this point from the case of *Arnold v. Hoddie* in 1765, to that of *Passey v. Hemming* in 1812. But it has been contended that, in the intermediate time, Sir William Wynne expressed an opinion decidedly hostile to the principle on which these cases had been adjudged. When the subject was indirectly brought to his notice in the case of *Netherwood v. Wright*;—as if the *obiter dictum* of a judge could be taken as affording any fair criterion of what his opinion might be when a subject of this nature should be brought before him,—or as if it were probable that any judge would on an incidental point step out of his way to give a decision on a question of this magnitude and importance.

Fortunately, however, we have the advantage of knowing what Sir William Wynne's (a) opinion really

(a) Now, under these circumstances, it appears clearly that the deceased, after having written the two papers which remain entire, executed two further wills, one in the year 1781, the other in the year 1798; but that these regularly executed instruments are each to the same purport, each to the same intent, as far as the two papers F. and G. go to make provision for the wife, and for the other relations who are there mentioned, it appearing clearly that the deceased's intention was in the first place to die testate; and, secondly, that substantially the intention of the deceased was to do that which he has done by the two papers F. and G. I should be extremely loth to find myself bound by the practice of the Court to establish as to those two papers, containing, as I think they clearly do, and are proved to do, what was the intention of the deceased down to the last of his testamentary

was on this subject when his mind was immediately addressed to it in the case of *Passey v. Hemming*,—he there states as the ground of the decision, that

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life, owing to its appearing that there were testamentary papers afterwards cancelled;—that they must be considered as revocations of these two testamentary papers, I should be extremely unhappy if I felt myself bound so to pronounce;—but I think I am not;—it appears to me, that all the cases in which that decision has taken place have gone upon the ground that there were differences,—that there were departures, and that what was the intention in the first paper was cancelled in the latter. I take it, by the civil law and the practice of this Court, a paper of a later date, containing a different disposition, would be a revocation of the former; and that, though the latter did not appear, and the former did, and was left;—it should require some account, or some declaration of the circumstances, in order to give it effect.

Now I think, in all the cases in which it has been held, that the former will was revoked by the cancellation of the latter.—In all the cases I have looked into at least, it appears that the intention of the deceased was varied; consequently, there was proof that he departed from the intention of the first paper.

In the case of *Helyar v. Helyar*, the first will was in the year 1742. William Helyar, the deceased's nephew, was the executor;—the deceased after that made another will, by which another person was appointed executor, and the latter will did not appear; but there was proof that the deceased declared his dislike to the marriage of William Helyar, who was the person appointed executor in the first will; that he declared that he had left him 40,000*l.*, but that he would not leave him a farthing;—from thence the Court concluded that the second will was inconsistent with the former, and on that ground revoked it.

In the case of *Jennings v. Whitehead*, the first will was in May 1711;—by that he appointed his nephew, Henry Whitehead, executor and residuary legatee;—in 1713, he made another will, appointing his wife executor;—in that same year, in a passion, he burnt his second will. The will with the residue

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*it appeared clearly, both that the intention of the deceased was to die testate ; and, secondly, that he always meant to do in substance that which the papers propounded would carry into effect ;—expressions which surely do not convey the idea that his opinion was in opposition to that series of cases which had been determined by his predecessors ; indeed, from the perusal of his judgment in that case, it is manifest that, entertaining the opinion he did as to the particular case immediately under his consideration, he nevertheless felt the greatest anxiety not to depart from the tenor of those decisions, or to decide any thing which might even in appearance indicate an opinion adverse to the great authorities which had preceded him.—This point was much laboured by him throughout the judgment. *Passey v. Hemming* has been pressed against us as conclusive ;—but that was a case decided upon its own special circumstances ;—several wills were before the Court in a cancelled state ; in all of them the testator had constituted his wife executrix, and given her the residue ;—his affection to her was not shewn to have been changed,—and the benefit to her was the characteristic feature of the will which was established. It may be observed also, that*

to Richard Whitehead still continuing in existence, he afterwards sent for an attorney to take his instructions for a new will, who asked him whether he had again received his nephew into favour. To which he replied, No, very far otherwise. Here was the clearest proof that could be, of a departure from the first will ; and, therefore, the Court pronounced against the first will. *Cited from Manuscript notes of Sir WILLIAM WYNNER's judgment in the case of Passey v. Hemming.*

Hemming's case was decided by a very thin commission of Delegates;—and that the judgment of the Court below appears to have been much influenced by an erroneous statement of Lord Alington's case.

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The Counsel for Mr. Thomas Moore objected, That it was not regular to allude, in reply, to a case which had not been before introduced into the argument.

Per Curiam. Mr. Justice Park.

I think, in this instance, the allusion is justifiable;—we have all been furnished, and very properly, with a copy of the judgment in *Passey v. Hemming*, in which Lord Alington's case is peculiarly referred to.

Per Curiam. Dr. Arnold.

It is very material that the circumstances of Lord Alington's case should be correctly stated; certainly, in *Hemming's* case there was a complete misapprehension of them.

Argument resumed.

Lord Alington died in 1722 (a); the will propounded was dated in 1685. It was stated in the argument on *Hemming's* case, that there was clear proof before the Court that Lord Alington had made another will within a few years of his death, in which Sir John Jacob was executor, containing a wholly different disposition of his property, but that this latter will could not be found;—and that it was on this point that the case turned.—On in-

(a) The cause was entitled *The Duke of Somerset v. Sir John Jacob*, Deleg. Jan. 22, 1725.

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vestigation, however, of the proceedings, it appears that there was no proof whatever before the Court of any second will ever having been completed ;—nor could the case have turned on this point ;—several inceptions of wills with revocatory clauses were produced ;—and the question was, whether these inceptions of wills, coupled with length of time, and great change of circumstances, would amount to the revocation of a will ;—and the Court decided in the negative.

The result of the consideration, and comparison of all the decided cases appears to be ;—that the presumption at common law is in favour of a revival, —and the presumption in the Ecclesiastical Courts is against a revival ;—but that either presumption may be rebutted by circumstances.

It has been said, however, that in all the cases where the making of a second will has been held to revoke a former will, there has been in the second a different executor, and a different disposition of the property ; from which circumstances the change of intention it has been argued must necessarily have been inferred. To us it appears that the present is a stronger case than any one of those yet decided, from the very circumstance of the same executor being appointed in both the instruments ;—because, if it is once admitted that the deceased cancelled her second will from the aversion she had conceived towards her executor, and from her determination that he should not be entrusted with the management of her affairs, is it likely that she should intend to leave in force another will of nearly similar import, in which she constituted the same

person her executor, and bequeathed to him the bulk of her property?—A., in fact, is the preparation for B.;—it is the substratum of it.—A. is informal and unsolemn; B. is regular and solemn, and contains a direct revocatory clause.

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With respect to the cancellation,—this must be considered as the rock on which the counsel on the other side have split;—to explain it away, they have been driven to resort to irrational and contradictory theories;—it has been argued by one as the result of accident, by another as the effect of design;—one has maintained that the deceased took great care not to cut through the attestation clause, while another has laboured to shew that not having the attestation clause before her eyes, she accidentally and inadvertently cut through it.

The passage from Swinburne has no application whatever to the present case;—it merely goes to this, that if a will is not advisedly cancelled, even though it be cancelled and blotted in its most essential parts, it is not to be considered in law as cancelled;—our argument is, that being found in the possession of the testatrix, if erased,—it must be presumed to have been erased by her;—*primâ facie*, it is mutilated; and it is for the party claiming benefit under the instrument, to shew that the mutilation was accidental.

Again, we have been told, on the authority of Ainsworth's dictionary, that "*concido*" means to cut in small pieces; and, consequently, cannot apply to the species of cancellation which this instrument has undergone;—we do not deny this meaning of the word, but we deny that it is the

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only meaning of it; and we assert that in the passage cited from the Digest, the construction of it is not limited to this signification. It is not so that the commentators have interpreted it. The glossary of Cujacius on this passage is, "*irritum fit etiam testamentum si deleatur vel incidatur.*" And Voet (a) understands *concidit* in the same sense. An autem consultò, an inconsultò ac præter testatoris voluntatem deletio, *incisio*, similiaque contigerint non juris, sed facti quæstio est. And again, consultò tabularum *incisio*, vel inductio aut cancellatio facta credatur, donec contrarium probatum fuerit. But if we are not to refer to commentators, but to dictionaries, Facciolati, who is of the highest authority among compilers of this class, states *concidere* in one sense to be synonymous with *abrogare*; and refers to this identical passage in the Digest as an example of such an use of the word.

No explanation then having been given of the cancellation, it must be presumed to have been done *animo cancellandi*;—on the face of it it is most carefully done, and has all the appearance of design;—the law cannot resort to fanciful suppositions in opposition to such an act;—we admit the act to be equivocal, and that the presumption might have been rebutted,—but we contend that all attempts to rebut it have failed.

Thus stands the argument on the documentary evidence;—but when reference is had to oral testimony to shew that Mrs. Moore did not consider B. as cancelled, and that her affection to her son

(a) Voet ad Pandectas, lib. 28. tit. 4.

Thomas continued unabated till her death, the facts established by evidence utterly refute any such notion.

Mr. French shews his impression of what the deceased's intentions were, by the reasons he gives for not having, according to her request, sent Mr. Butler to her:—all the witnesses speak to her displeasure, her dissatisfaction, and her acrimony, (these are their expressions) at her son Thomas's marriage;—to the bitter reproaches and opprobrious epithets she lavished upon him,—to her declarations that she now considered herself as having no relations;—and above all, there is clear testimony of the anxiety she expressed, to the latest moment of her life, to see Mr. Butler, for the avowed purpose of making a new will. It is in vain, in opposition to such stubborn facts, to argue that her letters begin and end with those expressions of affection and endearment, which a mother usually employs when writing to a son;—that her anger was only occasional,—and that she never seriously came to the resolution of making a new will.

The sum of the argument is, that there is clear proof of the cancellation of B.—that from the facts and documents before the Court, it is equally clear that if she intended to revoke A. she must be presumed to have intended at the same time to revoke B.;—and though she might not, and probably did not, intend to die intestate, yet it is obvious that neither of the wills before the Court contain the disposition she intended to make of her property;

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—whatever that disposition might have been, it would probably have been inofficious. It may be some satisfaction, therefore, to the Court, (if it is permitted to courts of justice to feel satisfaction on such subjects,)—that the only conclusion of law at which it can arrive is, to pronounce for an intestacy,—since there can be no doubt but that such a sentence will make a more just disposition of the property of this unhappy lady, than she, if she had lived a short time longer, would herself have made of it by will.

Feb. 5.

The Judges Delegates affirmed the sentence of the Prerogative Court of Canterbury;—but gave no costs.

PREROGATIVE COURT OF CANTERBURY.

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JAMES JOHNSTON made a will on the 21st of July 1793;—he was then resident in the island of Jamaica, and had two children, a girl and a boy, and his wife was pregnant. By this will he bequeathed “10,000*l.* to his daughter, 10,000*l.* to the child of which his wife was ensient, and if more than one, then 10,000*l.* to each, and the residue of his property to his son.” He quitted Jamaica shortly after the making of this will, and returned to England, where he continued to reside till his death, which happened suddenly, on the 3d of July, 1815, at his house in Wimpole-street;—he had four children born subsequent to the date of his will;—and his personal property at the time of his decease amounted to nearly 300,000*l.*—His widow was possessed of a considerable landed estate in fee.

The birth of children, combined with other circumstances, will revoke the will of a married man.

The will of the 21st of July, 1793, was propounded by the widow, who was one of the executors under it.—The three youngest children, who were minors, appeared by their guardian, and prayed an intestacy.

At the time of the deceased's death, the will of the 21st of July, 1793, was in the custody of his agent in Jamaica;—but in the pigeon-hole of an

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escrutoire in the library in Wimpole-street was found a will bearing date *June* 21, 1793, originally prepared for execution, but afterwards altered in several places by the deceased, and obviously used as a draft for the will of *July* 21, 1793. There was also found within the blotting paper leaves of a writing book in the same escrutoire (a) the sketch of a will in the deceased's own handwriting, without date or signature, written on the back of a printed letter from the West India dock-house, which letter was dated July 6, 1814. And, lastly, there was in the same escrutoire a will made prior to his marriage, and dated Charleston, November 30, 1782.

*Swabey and Jenner in support of the will.*

The question turns upon the birth of three children born subsequent to the date of the will, for whom no provision is prospectively made in that instrument, and upon the legal effect of this circumstance, on a will duly made and executed after marriage. It is important, if the law is already settled on this point, that it should remain unshaken. The will was made just previous to the voyage of the deceased to England; and it is said that it was only intended to operate in the event of his dying on the passage;—but his intent is not to

(a) This paper was propounded in the Prerogative Court on the 26th of June, 1816, as the last will of the deceased; but the Court held, that it could not be entitled to probate. It was marked with the letter C. in the registry of the Court, and is the paper referred to under this denomination, in the arguments of the counsel, and the sentence of the Judge.

be collected from circumstances, or other collateral matter, but from the words and tenor of the will,—which is absolute and unconditional, neither temporary nor contingent, in the terms in which it is expressed;—and if that construction from circumstances cannot be allowed where words are to be explained, much less ought they to be admitted to supersede a will regularly and deliberately made. In order to substantiate the opposite case, it must be shewn to form an exception to the general law, which is very accurately laid down by Swinburne (a) under the head of revoking the testament, and will be found to include most, if not all, the circumstances to be found in this case.

Such as the law stood in Swinburne's time, it still continues;—but not entirely without exception as from about the year 1682, which we take to be the æra of its introduction in *Overbury v. Overbury* (b); which was followed by *Lugg v. Lugg* (c) 1698; and afterwards by *Meredith v. Meredith* (d) in 1710, there have been many decided cases in which wills made before marriage, have been set aside both in this Court, and in the Delegates, by reason of marriage and issue, as well from the alteration of the state of the testator, as his presumed intention,—subject nevertheless, like any other presumption of law, to be rebutted by evidence of a contrary intent.

All such exceptions are *stricti juris*, and we shall

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(a) Part VII. s. 15. title "Of revoking the Testament."

(b) *Overbury v. Overbury*, Shower's Reports, Vol. II. p. 253.

(c) *Lugg v. Lugg*, Selkeld 592, and Lord Raymond.

(d) *Meredith v. Meredith*, 1710.

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contend that there has as yet been no instance, where either marriage alone, or birth of children alone, though attended with hard circumstances, has been thought sufficient, by the law of England, to revoke a will made after marriage. No doubt but that by the civil law the birth of a child only was the revocation of a will, for by that law a will was void when a father passed by a child without notice :—and a will was equally destroyed by the birth of a posthumous child. This depended on the strictness of the Roman law, by which a child had a right to a portion of the father's estate, of which he could not be deprived without just cause; but this law was never received here,—there is no instance of it.—By our law, the father of a family may dispose of his estate as he pleases ;—it is wholly in his own discretion ;—if that discretion is exercised imprudently, or improvidently, Courts of justice can afford no relief, except in cases of ideotcy or madness.—Every will, and revocation of it, must be the act of the testator himself ; and it cannot be set aside on any other foundation than a legal revocation by the laws of this country. Alteration of circumstances may reasonably require the alteration of a will ;—it would be matter of prudence to make a disposition suitable to the change, —yet men do not always act with prudence.

The testator also may think of doing it, but die without having made up his mind as to the specific disposition he would substitute, or death may have suddenly intervened before he has taken any final resolution about it :—if that should be the impediment, wherever it may occur, it is unfortu-

nate; but the law has no remedy for such evils;—if the deceased is in the progress of a testamentary act, the law will relieve if possible;—but a different disposition, if meditated, may from various circumstances be deferred where a person has a will by him; but why persevere in keeping a will if it was his intention to die intestate?—Mr. Johnston, by his conversations with his wife, was aware of the existence of this will, and of its operation;—to get rid of her importunity on the subject of making another will, he told her it was time enough to think of that; and on being asked what the consequence would be to his family if he died without a will, he would reply in general terms, “that the law would make the best will for a man,” but not that it would make the best will for him. His not having made up his mind to what specific alterations he would wish, if he proceeded to make a new will, may in great measure, likewise, account for his not having done it; he was aware also of the power his wife would have, if she should survive him, over a large real estate which she might charge with provision as she might think fit for any of her children;—but it never was his intention by any act or declaration to leave her in addition to her real property, one-third of his personal estate. There may be grounds on which to expect that the deceased, if he had lived, might have revoked this will by a new instrument. But it is sufficient for us to say, *that there is no case in which circumstances, aided by the birth of children alone, has been held to revoke the will of a married man*;—nor is such a question *res in-*

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*tegra*,—the point was fully and clearly decided by the Delegates in *Ward v. Philips* (a), which is mentioned by Sir George Hay, in his judgment in *Shepherd v. Shepherd*, and as appears also from the manuscript notes of Dr. Andrew's, who was counsel in that case. The case of *Combe v. York* (b), seems decided on the same ground.

The reasoning of Baron Carter in the case of *Noel v. Noel* (c) is to the same effect.—The case of *Shepherd* (d) itself was expressly referred by Lord Camden from the Court of Chancery to the Ecclesiastical Court, upon a question arising on the birth of a posthumous child, and whether such a circumstance could operate as a revocation of the will and codicil of the father;—the case was ably argued, and solemnly decided by an eminent judge, than whom none could have more feeling for the distress of such an incident, or would more gladly have found ground to set that will aside, as well as all others of a similar kind, as he declared; but he *could not break in upon a known rule of law*.—He readily admitted that marriage, with the birth of children, would vitiate the will of a bachelor made in a state of celibacy; but said, that marriage alone would not.—Children also born after the making of the will by a married man, will not.—For a married man must have children in view at the time of

(a) *Ward v. Philips*, Prerog. 1732. Deleg. 1734.

(b) *Combe v. York*, Deleg. 1738.

(c) Referred to in the case of *Parsons v. Lanoe*, Ambler, p. 557.

(d) *Shepherd v. Shepherd*, reported in a note to *Doe* on the demise of *Lancashire v. Lancashire*, T. R. Vol. V. p. 49.

marriage;—and children only add to his family,—they do not alter his state or condition.

It appears also from the case of Doe on the demise of *White v. Barford* (a), that it is the opinion of the present Chief Justice of the King's Bench, that it would be dangerous to extend the doctrine of presumptive revocations any further than it has been already carried.

The only remaining circumstance is the inception of paper C.; and if such a rude and unfinished sketch as this, or any other paper, about which no testator can be said to have taken any final resolution, could be permitted to revoke a will which must be presumed to have been made with deliberation, infinite mischief must frequently ensue;—but the rule of law *posterius imperfectum non tollit prius perfectum* has been recognized in numerous decisions, and is not now to be called in question.

*Adams and Lushington contra, for an intestacy.*

We admit that marriage, or the birth of children alone, will not revoke a will;—but the question is, whether the birth of children, with other circumstances, will not:—Lord Mansfield and Lord Kenyon have put the principles of presumptive revocations on different grounds;—the former presumed alteration of intention, the latter held that there was a tacit condition annexed to the will that it should not operate under such circumstances;—it is admitted by them, however, and all other judges,

(a) Doe on the demise of *White v. Barford*, Maule and Selwyn, Vol. IV. p. 10.

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that this principle of revocation is derived from the civil law.—The civil law is so far admitted into our law, that the birth of children may revoke a will, if accompanied by other strong circumstances ;—what these strong circumstances are the law does not define ;—the nature of them may be discovered from decided cases ; they are circumstances under which no rational man would expect a will to stand. *Overbury v. Overbury* admits the general principle.—In *Parsons v. Lanoe*, Lord Hardwicke takes the distinction between real and personal property, and admits the principle of these revocations, though the case rendered it unnecessary to decide the point.

In *Wells v. Wilson* (a), the judges at the cockpit, after much deliberation and repeated hearings, pronounced for the principle we contend for, and decided that the will was revoked ; it is impossible to find a case in which a stronger coincidence exists than between this and that ;—in both, the wills provided for children in ventre de sa mere ;—in both, the children born subsequently were totally unprovided for ;—in both, the testator had disposed of all his property ;—in both, the death was sudden. In *Shepherd v. Shepherd*, Sir George Hay admits the principle of the decision in *Wells v. Wilson*.

The alteration of circumstances in the present case is as great as can be imagined ; the time since the making of the will is twenty-two years ;—the fortune is augmented from 20,000*l.* to 300,000*l.* ; his family from two children to six ;—nor is it any

(a) *Wells v. Wilson*, mentioned in Sir George Hay's judgment of the case of *Shepherd v. Shepherd*, T. R. Vol. V. p. 49.



thing to say that Mrs. Johnston had property of her own, for the estate was her's in fee, and how she might dispose of that can be no argument in law ; and so Lord Hardwicke held in the case of *Parsons v. Lanoe*.

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*Swabey and Jenner in reply.*

The case of *Wells v. Wilson* was decided on different grounds from those stated ;—the decision was, that a man cannot die with two wills which are substantive and independent of each other,—and that where two inconsistent wills are produced of the same date, neither of which can be proved to have been last executed, they are both necessarily void, by construction of law.

#### JUDGMENT.

Sir JOHN NICHOLL.

This is a case certainly of much importance, both to the parties, and as involving a question of law of great extent and consequence. I have considered it with all the attention and circumspection in my power ; and I now proceed to the decision of it with much anxiety, and a painful sense of the responsibility that belongs to it.—My chief consolation, however, is, that if the judgment I am about to give should be erroneous, it may be corrected by a superior tribunal.

The question of law involved in this case, and to which I have referred, is, whether a will made by a married man having certain children, is revoked by the subsequent birth of other children

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left unprovided for, aided by other circumstances concurring clearly to shew (if such should be the result of the facts) that it was not the intention of the deceased that the will should operate.

I will first advert to the facts of the case, observing upon their effect as I proceed, in order to arrive at their true result; and I shall then consider the question of law.

The facts themselves admit of no controversy;—they are not involved in contradictory and conflicting evidence. They are stated in the plea, and are admitted in the answers.—The testator, Mr. James Johnston, died upon the 3d of July, 1815, at his house in Wimpole-street, leaving behind him a wife, three sons, and three daughters; one daughter being married, one son and two of the daughters being minors, which son has come of age since the commencement of the suit, and now appears in his own person.—The deceased left personal property, amounting to upwards of 200,000*l.*—There was also a real estate in the West Indies settled upon him, and his wife in survivorship in fee.—The deceased several years ago resided with his family in the island of Jamaica.—In the month of June 1793, being about to return to England, he made, and duly executed, the will in question, a very few days before he sailed.—The prospect of the voyage was probably the incitement to make the will; but there is nothing in the instrument itself, nor is any sufficient evidence laid before me, to render the validity of the will in any degree conditional and contingent upon the event of the testator's safe arrival in Eng-

land.—I am of opinion, therefore, on this part of the case, that the will remained valid after the arrival in England of the testator ; and that, unless it has been revoked by subsequent circumstances, it now remains valid.

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At the time of making this will, the testator had two children, a son and a daughter ; and his wife was then supposed to be ensient.—It is admitted in the answers, that his personal property at that time amounted to no more than from ten to fifteen thousand pounds, and his wife was provided for by the settlement of the real estate already mentioned.

Now, by the will in question, he gives 10,000*l.* to the child of which his wife was then ensient ;—if more than one child, 10,000*l.* to each of them :—the residue of his real and personal property he gives to his son ; and, in the event of his dying without issue, he gives certain legacies.

Let me here pause, in order to look at the principle of this will, and at the effect which it now would have if valid.—The principle or character of the deceased's testamentary disposition of his personal property (if I may so express it,) is to provide amply for his younger children ;—he is so anxious to discharge that duty, that he provides for the child or children of which his wife might then be pregnant.—Even if there should be only one child born, (which was the case) the whole personalty would be exhausted, and the eldest son would have nothing but the real estate.

Such would have been the effect of the will, and such was the intended disposition, if the deceased had died soon after his arrival in England.—He,

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however, lived above twenty years afterwards, and had three other children born besides the one of which his wife was pregnant when he made his will;—and his personal property had increased to upwards of 200,000*l.*—The effect then of the will at his death under the residuary clause is to carry 180,000*l.* of the personalty to the eldest son, in total exclusion of the three youngest children, who will be left entirely unprovided for, and even in great disproportion to the other two children, of one of whom his wife was ensient at the time of making his will.—This effect is totally inconsistent with the principle and character of the testator's intentions at the time of making his will.

It is also admitted, that this will was left in the hands of one of his executors, or his agent in Jamaica;—it was handed over from one agent to another, as they severally succeeded to the situation, but it was never in the possession of the deceased himself;—it is admitted that he brought over with him no duplicate of this will, he did not execute it in duplicate.—He did, indeed, bring over a draft or corrected copy of the will;—and in the year 1798, he received an inventory of the papers which he had left at Jamaica, one item of which inventory is in these words:—“ Under an open cover addressed to Alexander Wright, Esq. is a sealed paper in form of a letter, which was received by Mr. Landale from a Mr. Forsyth;—on the sealed paper is written, in Mr. Johnston's handwriting, ‘ not to be opened till certain accounts are received of the death of James Johnston.’ ” The draft of the will, and this inventory, were found together in the de-

ceased's escritoir, where he generally wrote. Now, from these circumstances, and from the conversations with his wife, to which I shall presently refer, though there is no reason to conclude that the deceased had neither forgotten that he had made such a will, nor supposed it was no longer in existence; yet still the will was not in his possession, so that he could at any time cancel or burn, or otherwise destroy it.—He could only do that, by sending for it to Jamaica, or by sending directions there to destroy it, to which he might not choose to trust.

It is farther admitted, that for these after-born children the deceased shewed an equal degree of affection, as for those provided for by the will.—The youngest son was placed with a merchant, with a view to his establishment with the deceased's assistance in a mercantile house; so that there is every reason to suppose, both from the presumed sense of duty, as well as from his actual conduct and affection towards these children, that he did not intend to exclude them from a provision after his death.

It is also admitted that the deceased at all times, and especially during the latter parts of his life, was very reserved respecting his property, and testamentary intentions; and was very reluctant to enter upon the subject, even with his wife:—when she commenced the conversation he seemed rather displeased;—yet, notwithstanding this disinclination, she did at different times, and as fit opportunities occurred, suggest to him the propriety of his making a will, representing to him that, according to the will made at Jamaica, the

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younger children would be left unprovided for ;—that the deceased on some such occasions answered generally, “ *that there was time enough for making a will, he would take care of that ;*”—now here is not the least appearance of approbation of, or adherence to, the will in question, in these conversations ;—where the wife represents that the younger children will be utterly unprovided for. He does not in the most distant manner intimate, what has been thrown out in argument, that as his wife in case of surviving him would have the real estate, she might have an opportunity of providing out of the real estate for younger children. Such a thought seems wholly inconsistent, indeed, with the will itself, and with the whole of his conduct, and seems never to have entered his imagination. So far from his having the slightest intention that the Jamaica will should operate, he accedes to the representations of his wife, as to the propriety of making a new will ; he merely procrastinates, and says, “ *that it is time enough to make a will, but I will take care of that.*”

It is further admitted, that Mrs. Johnston on one occasion mentioned to the deceased, what the consequences to his family would be if he died without having made a new will ; when he replied in general terms, “ *that the law made the best will for a man.*”

Certainly, parole declarations are always to be received with very great caution ;—in general, they are the lowest species of evidence ; though in this Court upon questions of factum, and also upon questions of revocation, the declarations of the de-

ceased are always received as corroborative evidence of intention,—both of the *animus testandi*, and the *animus revocandi*.—The loose declarations which a man often makes in conversation with his friends and acquaintance are of very little weight indeed. They may, on the part of the testator, be insincere, or at best the mere passing thought of the moment, and are liable on the part of witnesses to be misapprehended, and misrepresented.—But these confidential communications with his wife upon her serious representations to him respecting so important a subject, are deserving of rather more weight as evidence of the deceased's mind and intentions; and, judging from those declarations, he does not seem to have had any strong objection, even to an intestacy; for upon her enquiring whether he intended to make a will he answered, “that the law made the best will for a man.”—Yet, even upon these declarations the Court would be cautious in placing much reliance, if they were not confirmed by something more unequivocal and solid coming from the deceased himself in a different shape, and not open to any of the same objections.

There is before the Court a paper marked C. written by the deceased,—certainly within the last year,—possibly at a later period, of his life.—A paper which if it could have been shewn that it was written at a very short period indeed before his sudden death, (as might possibly be the fact) might have prevented the whole of the present question;—for in that case it might have been established as a will, and in its effect it would be completely revoca-

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tory of the present will.—Paper C. is in these words,  
“ *Whitehall estate, in the parish of St. Mary’s, with the negroes, stock, &c. is settled on J. Johnston and Mary Ballard Beckford, his wife, for their joint lives, and to the survivor of them. If, therefore, I should survive my said wife, I give, &c. the said estate, &c. to my eldest son James Johnston;*”—there are then some words struck through; then follows:—“ *in the event of his dying without issue, to Robert Ballard Johnston, my second son; and in the like event as to him, to my third son William Clarke Johnston, their heirs, &c. subject to the payment of legacies; to my other children, in equal shares, to the following amount, that is to say, to each of my said children, Robert Ballard, William Clarke, Mary Beckford Bevan, wife of Charles Bevan, Esq. Eliza Johnston, and Helen Johnston, and their respective executors and assigns, the sum of        out of my said estate, besides the respective shares of my money in the funds, as hereafter mentioned. I give to my brother David Johnston, if he should survive me, and if not, to such children of his as shall be living at my decease, the sum of*

*And to my sisters Jane Johnston and Eliza Johnston, the sum of        and to my sister Helen Carruthers, if she survived me, and if not, to her children equally, as in the case of my brother David’s children, the sum of        ;*” there is a mark with a caret, which refers to a clause at the end, intended to come in here;—“ *and I give to my said wife, if she survive me, and if not, to my son James, &c. the house in Up-*



*per Wimpole-street, in which I now live, with the furniture, plate, horses, carriages, &c. which I shall die possessed of; and to my friends, Patrick Lynch and J. H. Deffell, and to each the sum of and all the residue of my property to be equally divided between such of my said children as shall survive me, share and share alike; and I appoint executrix and executors of this my will, my dear wife, Mary B. Beckford, if she shall survive me; my son, James Johnston, or the eldest of my sons, that survive me; my brother David Johnston, and my friends Patrick Lynch, of the island of Jamaica, Esq. and John Henry Deffell, of the city of London, merchant."*

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These are the exact words of paper C.; and this paper is written upon the back of an old letter, which was dated the 6th of July, 1814, so that it must have been written after the date of that letter. The deceased died in less than a year afterwards, namely, the 3d of July, 1815. This paper for the reasons assigned by the Court, when it was propounded, could not operate as a new will: not being valid as a dispositive paper, it is not *per se* valid as a revocatory paper: but it is a circumstance of evidence tending to shew that the deceased did not mean the will made at Jamaica to operate; and it is extremely strong. In its principle of disposition, it is the same as the Jamaica will; but in their effect the two wills, from the change of circumstances that had intervened, would be very different indeed. By paper C. the whole of his personal property is to be divided equally among his children. The eldest son, so far from

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taking the residue 180,000*l.* of personalty to the utter exclusion of the three younger children, and in great disproportion even to the other two, would take only the real estate in tail, and subject to the payment of legacies to the other children; the amount of which legacies is left in blank. This approaches, therefore, very nearly to an intestacy: for though the widow was not intended to have her distributive share, as she was provided for by settlement; yet she was to take some benefit under the will; the house and certain effects in Wimpole-street, are left to her; and she had in no degree lost the affection of the deceased, for she is appointed to be his executrix.

Now this paper proves, in some degree, the sincerity of the deceased's declarations, "*that the law makes the best will for a man;*" not meaning, however, himself literally to die intestate, for it is clear he meant to make a will: his declarations are, "*there is time enough to make a will, but I will take care of that;*"—but still it shews that it was not the intention of the deceased to depart very far from that disposition which the law would make of his property.

Lastly, it is admitted, that the deceased died suddenly of apoplexy, having this intention of making a will; but from indolence, from procrastination, or possibly from not having made up his mind as to the amount of the legacies with which he should charge his real estate, while he is thinking there is time enough, he is suddenly overtaken by death, in the manner stated.

Such are the facts of the case.—The result of

them, so far as respects the intentions of the deceased to revoke, can hardly, I think, admit of question: there is not the slightest circumstance of a contrary bearing. If the deceased had had this will in his own possession, and had not cancelled it, as he did the other old will in his possession, that might raise an inference that he intended it should operate till he had made a new will.—If, when his wife conversed with him, he had expressed any adherence to this will, or any substitution for it;—such as a desire that she should provide for those younger children;—if he had left the residue to her, and thereby devolved upon her the duty of providing for those younger children, by giving the bulk of his property to her, that circumstance might have raised a similar inference: but his answer negatives all these suppositions.—It is, “there is time enough to make a will, but I will take care of that;”—if, notwithstanding those declarations, he had done nothing,—he had taken no steps, some doubt might have been raised;—but he does write this paper. If this paper had been the mere inception of a will, or if it had shewn an intention to give a very large portion of the personal estate to the eldest son, it might in some degree appear confirmatory of the will at Jamaica; and, adhering rather to the effect than the principle of that will, it might have raised some doubts whether he had made up his mind to revoke the Jamaica will.—But the paper C. is the very reverse of all this in its disposition.—Again, if, notwithstanding the writing of this paper containing such a disposition, the deceased had had a long

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illness ; had been aware of his approaching death, and yet had taken no steps, nor expressed any desire to make another will ; such a circumstance might have carried some inference adverse to revocation ;—but he died suddenly of an apoplexy.

Looking then at the different papers,—attending to the bearing of all the circumstances,—seeing that they are all set in one direction,—endeavouring also to divest myself as much as possible of any impression arising from the hardship of the case upon the younger children, and looking solely to the just result of the circumstances upon the mere question of fact as to the intentions of the testator, it is the clear moral conviction of my mind, that the deceased had not any intention whatever, at the time of his death, that the will made at Jamaica, which is propounded in this cause, should operate.

But the question still remains whether, in point of law, these circumstances, and this result, amount to a revocation of the will.

The general rule certainly is, that a will once executed remains in force, unless revoked by some act done by the testator, *animo revocandi* ; such as burning, cancelling, making a new will, and the like.—Swinburne lays it down in the passage which was quoted, and read by the counsel, that length of time, increase of wealth, prejudices to relations, or, as he expresses it, to *those in administration*, all concurring, will not revoke.—If a will be made on account of sickness, yet it is not revoked on recovery ;—though it be made on account of a journey, it is not revoked by a return.—He adds, “ *if a testator, after making*

*a testament, should have a child born, I suppose the testament is not thereby presumed to be revoked, especially if the testator live a long time after the birth of the child, and might have altered the testament, and did not."* He then puts several cases

where revocation shall be presumed, such as the executor becoming the enemy of the testator, and two or three other cases, which are certainly not law at the present day:—Swinburne, wrote in the latter part of Queen Elizabeth's reign; the Statute of frauds (29 Charles 2.) enacted some new positive rules, not only in respect to the factum of wills, but in respect to the revocation of wills:—but since that statute there have been several cases decided of *implied* revocations, many of which have been cited in argument.—Under those various cases several points are now settled which may be stated without reference to the particular cases themselves in which they were so decided;—*first*, that implied revocations are not within the statute of frauds;—*secondly*, that a marriage and birth of children do together amount to an implied revocation;—*thirdly*, that marriage, without birth of children, does not amount to an implied revocation;—*fourthly*, that the subsequent birth of children is not alone and without other circumstances an implied revocation.—But the point remaining for consideration is, whether the subsequent birth of children accompanied by other circumstances such as those in the present case, and leaving no doubt of intention, will or will not raise the implication of law:—or, in other words, whether the circumstance of subsequent marriage concurring with the subsequent birth of issue is an essential ingredient;

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—a *sine quâ non*, in order to produce an implied revocation.

Now to solve this question, it is necessary to trace this rule (if it may be so called) with respect to implied revocations up to its origin, to see upon what authority the rule stands, and upon what principles it is founded.—The importance of the present question requires that this should be done, and in detail.

A presumptive revocation of a will arising from marriage and the birth of a child is not mentioned, as far as I am aware, by any ancient text writer upon the law of England as a part of our English jurisprudence; nor, as far as I am informed, was it a part of the ancient jurisprudence of any other country.—It is not mentioned as a rule existing in Swinburne's time; nor is it enacted by the statute of frauds, or any other statute.

The first reported case in which this rule was applied is, I believe, that of *Overbury v. Overbury*.—That was a case of personal property;—and after that the case of *Lugg v. Lugg* in 1696,—*Meredith v. Meredith* 1711,—and many other cases of personal property, occurred. It was, however, not finally admitted as a revocation of a will of real property, until the year 1771, in the case of *Christopher v. Christopher* (a), in the Exchequer;—in that case one of the judges was dissentient, thinking the words of the statute too strong to be got over. Certainly, the words of the statute are very strong, that, “*no devise of lands shall be revocable, except*” by certain modes prescribed by the statute, “*any former usage to the*

(a) *Christopher v. Christopher*, cited in 4 Barrows 2132.

*contrary notwithstanding.*" No words can be well more clear than these words ; but, strong as they are, the judges ventured to get over them,—so far as to consider the case out of their operation ; and the decision in that case has been adopted in other cases, and has been approved by other judges. The rule then of revocation by marriage and issue stands, in point of *authority*, not upon any ancient rule of law ;—not upon positive enactment ; but as the result of decisions of courts of justice, even against strong words of positive law ; yet founded certainly, in my apprehension, on sound principles, and in order to arrive at substantial justice.

Having thus considered the authority upon which the rule stands,—I will next examine the nature and extent of the rule. It is not an absolute, it is only a presumptive, revocation ; and this presumption, or presumed intention to revoke, may be rebutted by other evidence. Some questions have arisen as to the species of evidence to be let in.—The evidence of circumstances has been admitted in all Courts, and in all cases.—In this Court parole declarations have always been admitted in concurrence with other evidence.—Doubts upon the admissibility of parole declarations have been raised in courts of common law ; Lord Mansfield, in the case of *Cubit and Brady (a)*, was decidedly of opinion for their admissibility ; but in all cases circumstances tending to rebut the presumption have been received.

It may be proper to refer very briefly to some of the cases in which the presumption has been considered as rebutted. The case of *Brown v.*

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(a) *Brady v. Cubit*, Douglas, p. 38.

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*Thompson (a)* was the case of a will before marriage, made in favour of a woman whom the testator afterwards married, and by whom he had afterwards a posthumous son;—and it was held not to be revoked by such marriage and issue, and upon the ground that the will made a provision for the wife, and through her for the son.

In *Cubit v. Brady*, Lord Mansfield lays it down “that a subsequent marriage and the birth of a child affords a mere presumption;—there may be many circumstances where a revocation may be presumed. The case in *Cicero (b)* is an old and well known instance of such presumption;” and Lord Mansfield there is made to say further, “I do not recollect any instance in which marriage and the birth of a child have been held to raise an implied revocation where there has not been a disposition of the whole estate. The testator disposed of a small part of his estate in charity; then, in contemplation of his marriage, he settles 600*l.* a year on his intended wife, with remainder to himself in fee; it is clear, therefore, that he contemplated the change in his situation, and provided for it as to his wife; and with regard to the children he will be supposed to say, I will keep them in my own power;” he goes on and says, “I am clear on the other ground;” the admissibility of a parole declaration,

(a) *Brown v. Thompson*, 1 Equity Cases Abridged, p. 413.

(b) *Quæ potuit esse causa major quam illius militis? de cujus morte, cum domum falsus,—ab exercitu nuntius venisset, et pater ejus re creditâ testamentum mutâset, et quem ei visum esset, fecisset hæredem, essetque ipse mortuus: res delata est ad centumviros, cum miles domum revenisset, egissetque lege in hæreditatem paternam testamenti exheres filius.—Cicero de Oratore, lib. 1. c. 38.*



"that this presumption like all others may be rebutted by every sort of evidence." In this decision the other judges concur; and Mr. Justice Buller, in the conclusion of his judgment, says, "implied revocations must depend on the circumstances at the time of the testator's death."

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The case of *Kenebel v. Scrafton* (a) was that of a will made in contemplation of marriage; and, by the birth of children after marriage, the Court held it was not revoked. Lord Ellenborough says in that case, "upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply only to cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice.—This cannot be said to be the case where the same persons who, after the making of the will, stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character."

In the case *Ex parte Lord Ilchester* (b) a disposition was made in favour of the children of the first marriage: the testator afterwards married, and had children of that marriage; but that was held not to revoke the will, upon the ground that the children of the second marriage were provided for by the settlement."

In the case of *Sheaf v. York* before the Rolls, the question arose on a devise of the real estate to the children of a first marriage; and it was held not to be revoked by the subsequent marriage and

(a) *Kenebel v. Scrafton*, 2 East. p. 530.

(b) 7 Vesey, Jun. 348.

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issue, because the children of the second marriage would derive no provision, since the whole real estate would descend in case of intestacy to the son of the first marriage; consequently, the revocation of the will, as to the real estate, would not furnish any provision for the children.

I will only mention one or two cases out of these Courts.—In the case of *Thompson* formerly *Myall v. Sheppard and Duffield* (a) before Dr. Calvert, it was held that though there was marriage and the birth of children after making the will, yet that the presumption was rebutted;—he concludes his judgment in these words, “*the facts thus operating against the presumption, I must pronounce it to be the will of the deceased.*” So again in *Wright v. Samuda* in 1793, before Sir William Wynne.—The testator gave some legacies, and then gave the residue of his fortune to his wife; she died, and he married again, and had other children; Sir William Wynne after stating, “that there was no difference between the will of a batchelor, and the will of a married man, or widower with children, as to revocation;” yet held that under the circumstances the presumption was rebutted, and the will was still a valid will.”—In the case of *Calder v. Calder*, Sir William Wynne laid it down “that marriage and birth of children is a presumptive revocation, but the contrary may be shewn, and the presumption be rebutted;—declarations of the deceased are admissible, not to revoke a will, but to explain the intention.”

In all these cases, and in several others, the will is

(a) *Thompson* formerly *Myall v. Sheppard and Duffield*, Prerog. Trinity Term, 1782.

not absolutely revoked, though followed both by marriage and issue. On such questions, whether it be to examine, if the presumption be raised, or whether it be to examine if the presumption be rebutted, the Courts do always inquire into all the circumstances of the case.

What, then, is the true sense, and sound reason, and foundation, of the rule itself?—In looking through the several cases, the foundation upon which the presumption stands, as pretty constantly stated, is the alteration in the testator's circumstances between the time of making his will, and the time of his death.—If it stood so general, as the mere *alteration of circumstances*, it would be very loose indeed. If it be added, "*total alteration of circumstances*," it is not much more definite.—But if the case be further examined, we shall find that Courts have required such an alteration of circumstances arising from *new moral duties* accruing subsequent to the date of the will, as by necessary implication creates an *intention* to revoke.—Here then, I think, we touch upon safer ground, and upon more solid principles.—Intention is the very foundation and corner stone, the very essence, of all wills.—The term "Will" necessarily means that it is the *testatio mentis*.—Intention is the principle of factum, and of revocation;—it is the principle of revocation whether it be direct by act, or implied by circumstances; the *animus testandi* or *revocandi* is the governing principle.—By Courts holding that marriage and the birth of children are not an absolute revocation, but only an implied revocation;—by their inquiring, in the manner I have al-

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ready stated, into all the circumstances, it is quite obvious that they examined into and endeavoured to get at the real intention :—but it might be opening too wide a door, if this enquiry were to be directed to every change of circumstances. Those loose rules which prevailed in Swinburne's time, are no longer admitted.—Courts have, therefore, required that the rule shall have for its basis a change of intention, produced by, and to be presumed from, some new moral obligation arising after the will was made ;—marriage and issue are supposed to produce those new moral duties ;—every man is presumed to intend the making of a provision for his family.

Having thus arrived at the true foundation of the rule, the question remains to be considered whether both circumstances are required to concur ; whether the rule has been so limited, as that *subsequent marriage* is an essential requisite.—Now I cannot help thinking that upon plain reason, and upon substantial justice, it should seem that the concurrence of marriage is not an essential part.—The birth of children, after making a will by a married man, may have imposed as strong a moral duty upon him, forming the ground work of *presumed* intention, and may be accompanied by circumstances furnishing as indisputable proof of *real* intention, as if the will had been made previous to the marriage. Marriage alone may possibly stand upon a different foundation and footing from after born issue. Marriage is a civil contract :—the wife may make her own conditions before marriage in order to provide against the negligence or injustice of the husband :—marriage settlements are

usual:—The law, out of the real property, makes a provision for the wife by dower. If she enters into the contract, and takes no precaution of this sort, she takes her chance either of the husband providing for her, or of providing for herself.—But after-born issue are parties to no contract; they come into the world entirely dependent upon the parent; and if it is the legal duty of a father while living to maintain his children, so it is a strong moral obligation upon him not to exclude them from a provision after his death.—It is true he has a right to do it; though at one time, at least in particular districts, he had not the right of excluding them,—the law did not allow him to dispose of his whole property;—at present he may if he pleases, and the law can afford no relief; but by moral obligation there is a strong foundation laid for presuming that he did not intend to exclude them. In point then of true reason and sound sense the concurrence of subsequent marriage is not essential in all cases. The circumstances of this very case in the most forcible manner do, I think, illustrate the truth of this position.

It must, however, be enquired in the next place whether the authorities and the adjudged cases have held marriage to be an essential requisite.

It appears from the first reported case, as well as from what has been stated in subsequent cases, that the rule was originally borrowed from the civil law. The civil law is certainly no binding authority in this country;—it is received where the law of England is silent, and where it is not at variance with the spirit and principles of the law of England;

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and when it furnishes a sound rule of equity and substantial justice: at all times, however, it has been adopted with great caution and jealousy.—Yet, so far as the rule in question has been borrowed from the civil law, it is quite clear that marriage, far from being an essential to that rule, had nothing to do with the subject. By the civil law the matter stands upon a different footing;—it is the birth (*a*) of issue alone that revokes. But even by the civil law the birth of children revokes upon the principle of presumed intention; for it supposes that the exclusion of children was not intended by the testator. The same notion seems to have prevailed in this country, and has given rise to a common error, existing to this day, that it is necessary to cut off a child with a shilling, or some small sum.

In the next place if we look at our earliest testamentary writer, Swinburne, the result is the same:—treating of an implied revocation, he speaks of cases wherein it is raised, and what circumstances will not raise it;—but he does not mention subsequent marriage as an essential ingredient, or as in any degree applying to the subject. In the passage already quoted, he seems to doubt whether by the law as it was then understood the birth of children would or would not revoke;—“ he supposes ” that is the way in

(*a*) This was the law of Rome from a very early period :—In Cicero’s time, we know that the point was considered so settled as not to be arguable.—Num quis eo testamento quod paterfamilias ante fecit quam ei filius natus est, hæreditatem petit ? Nemo : quia constat agnascendo rumpi testamentum.—*Cicero de Oratore*, lib. 1. 1

which he qualifies his expression—" *he supposes it would not,*" especially if there were circumstances tending to shew an adherence to the will. His words are—" if the testator live a long time, and might have revoked the testament, and did not, the rule of the civil law that the birth of issue revokes would not avail." And so is the rule at present;—the mere circumstance of subsequent birth of issue, without any other circumstances, is admitted not to revoke; it has been so adjudged: but as to subsequent marriage, Swinburne does not in any manner advert to it.

I come now to the adjudged cases. The first to which the attention of the Court has been called, is that of *Wingfield v. Comb (a)*, in 1669; which not being a question of revocation, is not mentioned as having much bearing upon the point. The case reported is to this effect—A. having a son and other children, married again;—five years before he died he made a will, taking notice therein that his wife was ensient, and giving to the child *en ventre sa mere* 1000*l.* if a daughter, and 100*l.* a year if a son, to be settled upon him and his heirs male; and if the son died without issue, then to the plaintiff. The wife was brought to bed of a son, and this son died in the life time of the father;—the testator died leaving the wife ensient with a daughter to whom no portion was left or other provision:—the Lord Chancellor Nottingham said, " In case of a devise I cannot help where the law fixeth the estate; but if you come for relief in equity, and there falleth out an unforeseen accident which if the testator had foreseen he would have altered his

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will, I shall consider of it :”—“ here he meant in case he left a daughter born after his decease to have provided for her ; and though it happened the wife had no such daughter when he made his will, yet she was ensient at the time of his death ;”—the Lord Chancellor then directed a bill to be brought, and that the posthumous daughter should be made a party. This does not seem to be a question of revocation, and therefore does not strictly apply : but it shews the anxiety of the Court to get at the object, and at the intentions of testators ; and the circumstance of subsequent *marriage* did not occur in that case.—The Lord Chancellor refers to another case in the course of his judgment : he says,—“ A. having only a daughter, devised to trustees to convey to the daughter in fee ;—the testator recovered and had a son ;—the daughter shall not carry land from the son.”—Here then, if I rightly understand the matter, the after born son revoked the devise to the daughter, which could only be upon the ground of presumed intention.—But here again, as in the former branch of the case, subsequent *marriage* is not an ingredient.

The first case directly upon the question of revocation was that of *Overbury v. Overbury(a)* in 1684 ; and the report is in these words, “ upon an appeal to the delegates it was adjudged that if a man makes his will, and disposes of his personal estate among his relations, and afterwards has children and dies, that this is a revocation of this will according to the notions of the civilians, this being an *inofficium testamentum*.” In this report it is to be observed, there is no mention whatever of subsequent

marriage being an ingredient: upon looking into the original proceedings I find that the marriage was also subsequent to the will; but the report shews that it was not understood by the lawyers of that day that marriage was a material circumstance; for so far from its being considered essential, it is not even adverted to in the report. He states the revocation to be founded upon the idea of the civilians that it was *testamentum inofficiosum*; if it was so, it could only be upon the birth of children, for the civil law looks to that circumstance only;—marriage has nothing to do with the subject according to that law.—Here then is the civil law from which the rule is supposed to be borrowed;—here is the opinion of Swinburne;—and here is the report of the first adjudged case upon the question of revocation, all concurring in considering the birth of children as the essential ingredient,—and in which *marriage* is in no degree adverted to as a material circumstance.

The next case is that of *Lugg v. Lugg* (a), which happened in the 8th William III.; the report in Salkeld is in these words—"Before a commission of delegates—one being single made his will, and devised all his personal estate to I. S.; afterwards he married, and had several children, and died without other will or dispositions: and now *coram delegatis* of which Treby, C. J. was one, it was ruled that there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the

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(a.) 2 Salkeld, 592. 1 Lord Raymond, 441.

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same mind." Here both of the circumstances are mentioned,—the subsequent marriage, and the birth of children; but it is put upon the evidence of presumed change of intention arising from change of circumstances, not adverting specifically to marriage as one of the circumstances, but that all the circumstances taken together did amount to presumptive evidence to shew that the testator did not continue of the same mind.

The next case which has been adverted to is *Meredith v. Meredith(a)* in 1711; of that case I happen to have two manuscript notes, both in the handwriting of Dr. Andrews. I am not able to ascertain which was first made; but they both state the circumstances of the case to the same effect, and I will read them both at length.—“*Meredith v. Meredith*, 1711. Henry Meredith in 1708 made his will, and therein makes his brother Roger Meredith, his executor; he afterwards marries, and settles the leasehold estate in trust for him and his wife, during both their lives; and after their decease, for his executors, if he makes a will, or administrators, if he dies intestate:—he leaves issue one daughter, and dies.—Among his writings is found the draft of a will, which begins in these words:—“In the name of God, Amen.—I give all my estate in the manner and form following, that is to say, I give to my wife all my plate and jewels,”—and there leaves off. The brother prays probate of the will of 1708; the widow desires administration with the testamentary schedule annexed.—*Per Curiam*.—Sir Charles Hedges decrees administration to the widow, with the testamentary

(a) *Meredith v. Meredith*, Prerog. 1811.

schedule annexed. In *Overbury's* case it was determined that the subsequent marriage and the birth of issue destroys a will made before marriage. The beginning another will shews that he intended the first should not be in force, but was supposed to be revoked by the marriage settlement."

Dr. Andrews, in this report, does not state the question or the grounds of decision very pointedly. The other report is in these words:—" *Meredith v. Meredith*.—The testator left a daughter, and died possessed of a lease of tithes about 100*l.* a year, held under the Archbishop of York;—by marriage articles, this was settled on his wife for life, then to his executors and administrators;—he died at Christmas 1710. Among his papers was found a will dated 1694, and another 1708, in which Roger Meredith, the plaintiff, was executor, and this lease given him; there was likewise an imperfect will, in which the testator gave his wife some jewels and plate, but went no farther. Question if the marriage articles, a child born after this will, and another will began, was not a revocation of that of 1708. Judge of opinion it was,—and founded himself principally upon the birth of the child;—and *Overbury's* case, which had been adjudged in the Delegates, was quoted as an authority, and decreed administration to the widow with the paper annexed."—Here then Dr. Andrews does state the question: he mentions the circumstances upon which the case was to be decided, and states the ground of decision.

Now there are some observations which present themselves upon these notes.—In the first place, the putting this lease in settlement could

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only have revoked the will *pro tanto*;—namely, so far as respected the bequest of that lease.—The testamentary schedule could not be a very material circumstance, except as a circumstance of evidence, because it certainly of itself could not have revoked the whole will, inasmuch as it was merely the inception of a new will, and according to every rule the inception of a new will, will not revoke; but as far as it goes, it is to be taken in conjunction with the former will.—The marriage itself could not be a very material circumstance, because there was a settlement made providing for the wife;—but the report says, the judge founded himself *principally upon the birth of the child*;—that is expressly stated by the reporter as the principal foundation of the decision.—The marriage is not even adverted to;—where he is stating authorities he considers *Overbury v. Overbury* as a parallel case, and seems to have been aware that subsequent marriage had occurred in that case, though the report, in enumerating the grounds of the sentence, does not mention that circumstance;—so that it seems to have been, upon all the circumstances considered together, the birth of a child being the principal circumstance, and marriage not even mentioned, (at least by the learned reporter it was so understood,) that Sir Charles Hedges held the will to be revoked in the case of *Meredith v. Meredith*.

The next case adverted to is that of *Ward v. Phillips* in 1734; it is very shortly stated in *Shepherd v. Shepherd*, in the 5th Term Reports. The circumstances were these:—Captain Rowland Phillips died in September 1731; leaving a widow and three children at the time of his death;—no will

was found;—the widow had renounced the administration, which was granted to the grandmother of the children;—the widow afterwards married Ward, the plaintiff;—a will was subsequently found in a portmanteau among a parcel of papers;—it was made twelve days after the marriage, and gave every thing to the wife;—evidence was gone into to shew that the testator had afterwards a bad opinion of his wife,—that they lived upon very bad terms,—that she had been confined in a madhouse for a very considerable time, and that in the latter part of his life he lived separate. The Prerogative Court appears to have pronounced against this will, not upon any question of revocation, but upon failure of the proof of the factum.—I have looked into the pleadings and evidence; and, as far as can be collected it appears that the opposition was directed against the factum;—it was offered to prove that it was a forgery,—that the testator was abroad at the time the will was made,—that he lived on ill terms with his wife, &c. Thus the original grounds intended to shew that he had made no will, and not to raise the question of presumed revocation.—The Delegates reversed that decision, and were of opinion that the factum was fully proved;—they were also of opinion it was not revoked,—for from the notes of counsel it appears that this point was raised and discussed, namely, whether the will was revoked or not;—and I find in some subsequent cases it has been quoted, both in argument and decision, as an authority that the birth of children alone will not revoke.—But suppose the direct point to have been raised, solemnly raised, instead of occurring accidentally in argument,—I think that there were

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grounds upon which the Delegates could not decide otherwise than for the validity of that will. The will is made twelve days after the marriage;—why, certainly, at that time the testator must be presumed to have contemplated the birth of children;—he must have made his will in contemplation of that event;—he thought it proper at that time to give the whole to his wife;—it is by no means an uncommon thing both for a husband expecting children, and a husband having children, to give every thing to the wife, under the idea that his death will devolve upon her the duty of providing for those children; and that he enables her to discharge that duty, and provide for them by leaving her the bulk of his property. In the case of a will made in that way twelve days after the marriage, when the event of children must be presumed to be contemplated, it would have been exceedingly dangerous to have held such a will to be void;—besides, it was proved that the will remained in the deceased's own possession, in a trunk with his own letters;—there was no inception of any new will,—so that the revocation must have arisen, if at all, upon the state in which the deceased afterwards lived with his wife;—but the two great circumstances of difference between that case and the present are those already referred to, first, that the property being given to the wife, the duty of providing for the children devolved upon her, and, therefore, they could not be considered as unprovided for; and, secondly, that the will was made at a time when he contemplated the fact of his having children.—That case then, though of very considerable weight, yet does not appear to me to go the whole

length of establishing that the birth of subsequent children accompanied by a different combination of circumstances may not, without subsequent marriage, raise a presumption of revocation.

The case of *Parsons v. Lanoe* (a) in 1748, was this:—Colonel Lanoe, a married man, but without children, made his will on going to Ireland;—he afterwards returned, and children were born;—the question was, whether the will was revoked by his return, or by the subsequent birth of children. The Lord Chancellor decided that, upon the words of the will, it was to be considered as contingent upon his return from Ireland, and consequently was void, and he thought it therefore unnecessary to decide the second point; but the very circumstance of the second point being argued, and the reserve which is maintained upon it by the Lord Chancellor, shews that, at that time at least, there was no such rule understood in the Court of Chancery, as that the concurrence of subsequent marriage was essential to the revocation of a will.

The case of *Altham v. Gray* is, I think, admitted on all hands to have very little bearing on the question, and therefore it is useless to quote it.

The next case is that of *Wells v. Wilson*, decided at the Cockpit in 1756.—It is cited in the case of *Shepherd v. Shepherd*, as reported in a note of the 5th Term Reports, and given in the judgment of Sir George Hay.—I have seen the printed cases;—and several inaccuracies in the case as reported in *Shepherd v. Shepherd* certainly exist.—I have never seen the appendix of the case, so that I am not ex-

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actly aware how the evidence stood upon the contrary statements which are made in the printed cases;—but, from them I think the facts may be collected to have been as follows.—Mr. Nicholas Taylor was the deceased;—he died at St. Christopher's in 1751;—he left a widow, and five children, and a very considerable real and personal estate;—the will in question was dated November 5, 1748;—he gave to the wife one-third of certain plantations for life, —and the furniture absolutely;—he gave to his daughter Elizabeth, and his son William, and the child or children of which his wife was then pregnant, 31,000*l.* between them;—the instrument concluded with the words, “ *I hereby revoke all former wills by me made, and acknowledge this my last will and testament;*” the will was written on one side of a sheet of paper;—on the other side of which was written another testamentary paper, expressed nearly in the same words, and almost to the same effect, but which was neither dated, nor signed;—the deceased left two children born after the will was made;—one of them I collect to have been the child of which the wife was then ensient, —the other was wholly unprovided for;—in 1749 the deceased had a fall from his horse, but recovered and lived two years afterwards;—it was alleged on one side, that he frequently declared that he had made no will;—and after his fall he said, “ *it was lucky that he had recovered, for his affairs would have been left in great confusion;*” —but on the other side, it was asserted that he had often declared he had made his will, and only thought of altering it:—six months before his death, he had asked Mr. Wilson to be his executor;



—it appeared that he was equally fond of those two younger children, as of the others,—and his fortune had considerably increased since the making of his will ;—in his last moments a person had been sent for, to make a will for him,—but when he arrived, the deceased had become delirious, and consequently could not make another will :—the will in question was found in the bottom drawer of his bureau ;—on one side it was asserted that it was found among loose papers ;—on the other, it was asserted that it was folded up among papers of consequence.—At St. Kitts the will was pronounced for ;—but this sentence was reversed before the Committee of the Privy Council for hearing plantation appeals.—It has been contended that doubts must have arisen which of the two papers was first or last written, and also whether the will was meant to act upon real estate.—As to which of the two papers was first or last written it could not be material, because the one paper was executed, and the other was not ;—the papers were nearly transcripts of each other,—there was no very material difference in the disposition ;—taking them either way (though certainly, the probability is that the unexecuted was first written, because the executed one was more formal than the other,—the one was dated, the other without date,—the concluding words of the one are, “ *I do hereby revoke all former wills by me made ;*” the other was the same, with the addition of, “ and I acknowledge this to be my last will and testament,”) but take it either way, suppose that he wrote the unexecuted paper first as a rough draft of his will, and the other afterwards, making some alterations as he proceeded, and then dated and

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signed it; there can be no doubt whatever but that the executed instrument would supersede the other:—taking it the other way, that he having executed the one paper began this other paper, but did not go on to complete and sign it,—what would be the construction in that case? Why, that he afterwards gave it up, and abandoned it, remaining content and satisfied with the will as it was executed and before signed by him. There can be no doubt, therefore, but that the executed paper was the only valid instrument. The Court might well wish to see the paper itself;—they might well suspend their judgment till it was produced, for there might have been something important arising upon the face of it;—but it is evident from the report of the case that Sir George Hay, who had been counsel in the cause, did not consider the cause to have turned upon any point as to which of the two instruments was the last.—Again, it has been said that the will was intended to operate upon real estate; and therefore not being sufficiently executed for that purpose, that it could not be a valid will, as to the rest of the property;—but it is surely unnecessary to state that this circumstance would not affect its validity as to the personalty. The factum then of the paper having been established, as it must have been in that case, the Court could only hold that it was revoked by circumstances.—Now among the circumstances, subsequent *marriage* did not occur;—the birth of children, accompanied by other circumstances, must have been the ground of holding the instrument revoked. Sir George Hay, in speaking of this case in *Shepherd v. Shepherd*, evidently so considers it. This then is an affirm-

ative case ;—and upon the point whether marriage is essential to revoke, one affirmative case holding a will revoked without that ingredient is infinitely more decisive than many cases without that circumstance in which the will is not held to be revoked ;—because it might be held not to be revoked on account of the absence of other circumstances tending to prove the intention of the testator to revoke it.

The case of *Shepherd v. Shepherd* goes no further than to shew that the naked fact of after-born children does not revoke. That was a case sent out of the Court of Chancery for the opinion of the Prerogative Court.—In the Term Reports (a) it is thus stated, “ *Shepherd* the testator having made his will, after some small legacies to his collateral relations, made his wife residuary legatee ;—after the will in 1763 his wife was brought to bed of a daughter ;—upon the birth of this child the testator added a codicil, whereby he directed that the legacies should be paid, and that an annuity of 300*l.* should be secured on the residuum, and paid to his daughter ; the codicil and will were found together,” I presume found together in possession of the deceased.—“ In 1765 another daughter was born ;—in 1768 a son, who was a posthumous child, the testator having died about six months before his birth ;—these two last children being unprovided for, this suit is commenced to set aside the will, and decree an intestacy :—whence it appears that the question is

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(a) 5 Term Reports, p. 51.

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whether the testator's will is revoked by the subsequent birth of two children who now remain unprovided for."—That very able judge decided that under the circumstances of the case the will was not revoked,—that the mere fact of after-born children did not revoke.—Certainly, that case; as far as it goes, is binding upon me; and if it be not presumptuous, I should add, that it is a decision in which I am disposed to concur.—Upon the question of intention, which in the judgment given by Sir G. Hay is admitted to be the governing principle, he says, "it has been urged that the intention of the testator would govern, if the intention be consistent with law:—this is certainly true, but that intention must be plain and without doubt; but that is not the case at present, for here is no guide to be found." Upon the intention to revoke very considerable doubts might well be entertained under the circumstances—the will was not of very old date;—it was in the testator's own custody;—and upon the birth of the first child, so far from revoking it, he makes a codicil providing for that child out of the residue, and confirms the will:—and upon the birth of other children he might also intend to make a provision for them out of the residue by further codicils, or he might not ever intend to do so; for having given the residue to the wife,—having lived with her a longer time, he might be presumed to have confided to her the duty of providing for those children.—Here was no inception of a new will:—still less was there an entire new disposition, inconsistent with and therefore tending to revoke

the former. So far, therefore, from the intention being "plain and without doubt,"—which Sir. G. Hay states, as being necessary,—the probability of fact is rather an adherence to the will, or at most that he meant to provide by codicil for after-born children.

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The utmost length, therefore, that the decision in that case goes, is, that the mere subsequent birth of children, unaccompanied by other circumstances proving intention, does not amount to a presumed revocation.

To the same extent but no further, hardly indeed so far, goes this last case which has been decided, viz. that of Doe on the demise of *White v. Barford*, (a) and another. "The plaintiff claimed under the will of one J. Borteel, who, being seized in fee in 1791, married, and in 1792 made his will and devised the premises in question to his neice, from whom the plaintiff derived her title.—Borteel died leaving his wife ensient, which was unknown to either of them at the time of his death; and afterwards the wife was delivered of a daughter, from whom as heir at law the defendant derived his title; and the question was, whether the alteration of circumstances was a revocation of the will.—The learned judge at *nisi prius* ruled that it was not a revocation; and the Court of King's Bench was of the same opinion. Lord Ellenborough says, "The argument seems to be that the testator, had he known his situation, ought to have revoked his will; therefore, the law will impliedly revoke it:" then he goes on to say, "Where are we to stop?"

(b) 4 Maule and Selwyn's Reports, p. 10.

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so that it was the mere naked fact of the after-born child,—no corroboratory fact to shew an intention to revoke;—indeed, if *actual* intention be necessary, in this case of *White v. Barford* it could not have existed, because the wife was not herself aware of being ensient; and, therefore, the husband could not, in fact, have intended to revoke; and the will could only be held to be revoked by fiction of law.—The Court of King's Bench did not, I apprehend, mean to lay it down that no possible combination of circumstances, accompanying subsequent birth of children, can amount to an implied revocation, unless marriage be one of the concurrent circumstances.

The very circumstance of trying this case so recently, and even applying to the Court for a new trial, shews, by some degree of inference, that no such rule is considered, even at the present moment, as being settled in Westminster Hall.

The same inference is to be drawn from the Court of Chancery's having sent the case of *Shepherd v. Shepherd* to this Court:—nay, Sir George Hay, himself, seems to me to have laid down the reverse; and seems to have held that the case of *Wells v. Wilson* was a case establishing that, with special corroborating circumstances, the birth of children might revoke without after-marriage;—for he states, “ *as marriage alone will not revoke, so the birth of children will not revoke unless upon very special circumstances.—It has been done sometimes under a combination of circumstances, but never on the mere ground of the birth of a child: the first case I remember of that kind is the case of*

*Wells v. Wilson, at the Cockpit.*—Laying it down, therefore, that the birth of children, with special circumstances, may revoke; and referring to the case of *Wells v. Wilson*, as a case in which it had been so held;—and speaking of that case, not as a singular case, *but only as the first case.*—It is very possible that the report may be incorrect in that respect; or it may be, that though no other case has been found, one or more may have existed; though, from the decisions of this Court not being reported, it is possible it may have escaped notice.—Sir George Hay, in stating the case, specified the combination of circumstances under which the revocation was held:—he had been of counsel (as already noticed) in the case, and is now stating the facts judicially, so that it must be inferred that he stated them correctly.—The way in which he states them is this, “*The decision did not turn upon the naked fact of the birth of a child unprovided for, but upon that,—and the frequent declarations of the testator,—the state of his mind,—and his repeatedly declared intention in the interval between the fall and his death.*” Now it so happens that all those circumstances do occur here; and even others still more decidedly furnishing evidence of intention to revoke. In this case, as in that, there is a strong anxiety to provide for after-born children shewn in the will itself; for in each case the testator provides for the child with which his wife is ensient:—in this case as in that the residue is given to the eldest son; but here it is clear that he did not mean to give to his eldest son more of his personal estate than to the rest of his family:—as far as we can rely on

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the papers produced in that case, the declarations were loose and general ; but here the declarations to his wife are confidential and precise, that “ *there is time enough to make a new will, but he will take care of that.* ”—In that case, though he intended to make a new will, and the person was sent for, but arrived too late, yet there were no instructions given,—nothing begun,—nor was it known what the import of such new will might be :—though he had had a violent fall from his horse two or three years before, endangering his life, yet, even under that sort of incitement, he only talks of, but does not set about, making a new will :—but in the case before the Court, here is not only the inception but the entire outline of a new will :—this new will shews a complete departure from the effect of the former will, as I have already mentioned :—this new will shews that, so far from intending that the immense residue of his personal property should go to his eldest son, he even meant to charge the real estate, before the son was to enjoy it, with legacies to younger children.

The deceased, when talking of intestacy, seems to have had but little objection to it ;—he says, “ *the law makes the best will for a man.* ” He might not mean to die intestate, and yet have no very great objection to it.

Finally,—here is sudden and unexpected death.—Now in some of the earlier cases the inception of a will was considered a very important circumstance, as shewing an intention to revoke ;—at one period, before the law of this Court and its principles were correctly settled, an unfinished paper, coupled



with sudden death, would have been established, even though a considerable interval had elapsed between the writing of the paper and the death of the testator. I doubt, whether at the period to which I allude, paper C. might not have been established: but it is now clearly settled that in respect to an unfinished paper, though followed by sudden death, the interval must be accounted for;—and it must be shewn that the testator adhered to the intention, but was prevented from finishing it.—But still the writing such a paper, and sudden death, are extremely strong circumstances, in addition to the birth of subsequent children, to establish the intention to revoke. The present case, therefore, has a combination of circumstances, which appear to me to be stronger than those of *Wells v. Wilson*;—and as strong as can well be imagined,—tending to shew that it was the intention of the deceased not to adhere to the old will which he had made under very different circumstances twenty years before.

The Court has been reminded, and not improperly, that it cannot make or alter the law; that it cannot make or revoke wills;—and undoubtedly it cannot:—it is bound conscientiously to administer the law as it finds it;—to ascertain its true principles;—and to be governed by established rules. It is for this reason that the Court has endeavoured, as far as was in its power, to trace this matter up to its true principles;—and to ascertain the rules growing out of those principles;—and to be governed by them. The first principle of all

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wills is the intention of the testator. Positive law, and the decisions of Courts, have prescribed certain rules for ascertaining that intention. They have prescribed that a will of land shall not be good, unless executed in the presence of three witnesses;—that a will of personalty shall not be good (with certain exceptions,) unless it be in writing.—So again, the law has established rules for ascertaining the intention of revoking; in some cases it requires certain acts to be done by the testator.—It has also, from certain circumstances, implied an intention to revoke. The change of circumstances may imply a change of intention; but the great circumstance which has been regarded as laying the foundation of this implied change of intention is the subsequent acquirement of new moral duties. It is the duty of a father to provide for his children. The law, upon that duty as the principal circumstance, may safely found the intention to discharge it. The Roman law acted upon that circumstance alone; and presumed an intention not to exclude the children. The law of England has not gone so far. It has adopted it as a leading circumstance, but not as alone sufficient to shew an intention to revoke;—marriage, however strong it may be as a concurrent circumstance, is not, as far as I have been able to trace the matter, absolutely essential:—it was not the doctrine of the civil law;—it was not held to be essential by any thing laid down by earlier writers. It is not considered as essential in the earliest cases. And in tracing the doctrine downwards, I have been unable to find it settled,

that a revocation cannot take place without the concurrence of subsequent marriage. On the contrary, as far as I can understand the case of *Wells v. Wilson*, there is one case at least, in which a will has been held to be revoked by the birth of children, without the concurrence of subsequent marriage, but accompanied by other circumstances.

The Court has been also warned in respect to the danger of rendering the law vague and uncertain:—undoubtedly it is the duty of every Court to be cautious of opening a door to uncertainty;—but Courts must also be cautious lest, whilst they are attempting to establish rules to guide to certainty, they do not undermine principles, defeat intention, and thereby lead to injustice. Courts have not gone that length. Even where marriage and issue do concur, they have not held such a concurrence to be a positive revocation; but all the circumstances are let in for the purpose of ascertaining whether it was, or was not, really the intention of the testator to revoke. The danger of uncertainty appears to me to be little, if at all, greater in that case than in the present.

Unquestionably where a will has been once regularly made, the presumption of law is strong in its favour; and, as Sir George Hay states, “*the intention to revoke must be plain, and without doubt.*” But, under all the facts of this case, taking the subsequent birth of issue as the essential basis of the proof, and accompanied as it is by the other concurrent circumstances, I am of opinion, that the intention of the testator is “plain, and without doubt,”

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and, therefore, that I am warranted in law and justice to pronounce against this will, upon the ground that it has been revoked.

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Application was made that the Court would direct the expences of the suit to be paid out of the estate.

*Per Curiam.* Certainly.

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CONSISTORY COURT OF LONDON.

1812,  
*Hilary*  
*Term,*

POUGET *v.* TOMKINS, falsely calling herself POUGET.

**WILLIAM PETER POUGET** was born at Surat, in the East Indies, on the 5th of May, 1794.—In the month of May, 1810, his father, who at that time resided in Blandford-street, Portman-square, was informed by one of the servants in his family that his son had been married, in the preceding January, to Lucretia Tomkins, his grandmother's maid. Upon investigation, it was ascertained that the marriage ceremony had taken place in the church of St. Andrew's, Holborn, after a publication of banns, under the names of William Pouget and Lucretia Tomkins, in which they were both described as residing in that parish.—It was in evidence also, that an attempt had been first made to have the banns published in Highgate church: but, upon the names being delivered to the clerk, he asked if the parties resided in Highgate parish; to which the bearer of the paper on which the banns were written (a servant girl in Mr. Pouget's family) replied, "that she believed they did, but she did not know where." This answer not satisfying the clerk, no further steps were taken for their publication in that parish.

*Jan. 24.*  
The marriage  
of a minor an-  
nulled, on ac-  
count of a  
fraudulent  
publication of  
banns.

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v.****TOMKINS.****JUDGMENT.****Sir WILLIAM SCOTT.**

This is a suit brought by the father of William Peter Pouget to annul a marriage contracted by his son, on the grounds of minority,—want of consent,—and undue publication of banns.

William Peter Pouget was a minor at the time of the marriage, having been born in May 1794,—and married in January 1810, at St. Andrew's, Holborn;—his father's residence, and consequently his, he being resident with his father, was in the parish of Marybone;—his alleged wife was a servant in the family;—her age does not appear;—the letters exhibited from her shew her to have been an uneducated person.

The minor's name of baptism is William Peter;—it is proved that the name of William was merged in that of Peter, which was the only appellation in common use.—Maria Perkins says that he was scarcely known to have any other name, except by his very near relations;—she is supported in this by other witnesses;—his letters were generally subscribed Peter, and rarely William Peter Pouget;—in the letters of the party against whom the suit is brought she styles him Peter, and it appears that she always in mentioning him, termed him Master Peter; so that it is clear, however William might compose a part of his baptismal name, the other had obliterated it in common use. The name of William Pouget would not describe him to most persons so as to notify him to be the person so described.

By what preliminary measures the marriage was brought about does not appear ;—nothing transpires before an attempt to publish the banns at Highgate, which miscarried. One of the witnesses carried the banns to the clerk at Highgate, who asked if the parties resided in the parish ;—her answer implied that she believed they did not, and in consequence thereof the publication was declined.

It appears in this case, that the banns upon which the marriage afterwards took place at St. Andrew's, Holborn, were delivered by the minor ;—a circumstance which would not take away the fraud, for that is charged to have been committed not on the boy himself,—but on the parental rights of the father ;—and though the case might have been grosser if it had been proved that the party herself, who is proceeded against, had been active in giving the banns for publication, yet it makes no such a material difference that they were given by the boy himself, as to the fraud upon the parent.

The account which Mary Hemming gives of the marriage is, that the parties in her presence were married by the names of William Pouget and Lucretia Tomkins. The clergyman asked the name and residence ;—he answered that his name was William Pouget, but he was confused in his answer as to his residence. The brother of the woman answered concerning the residence ;—he probably, therefore, was the principal mover in the business, although this does not distinctly appear ;—but it is clearly established that the banns were published in the name of William Pouget,

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omitting the Peter,—that the father was totally ignorant of the marriage,—and that he was not informed of it till some months afterwards, when he was both surprised and grieved.

The act recites the general inconvenience which had arisen from clandestine marriages, and professes to prevent it in future.—For this purpose it directs a notice in writing of the true Christian and surnames, and residence of the parties, to be given in writing to the minister seven days before,—otherwise he is not obliged to publish them;—but he is not forbidden to publish them, though not so delivered;—and I suppose that this regulation respecting the time of giving the names is not very generally observed in practice.

It is the clear intention of the act that the true names should be published; it was not necessary to insert this in the act. It had already directed that true names should be given in for publication; and if it had not, still if the true names are not published, it is no publication;—no notice is given, and there is no opportunity afforded, to persons interested in preventing the marriage, of knowing what is about to take place;—no one can allege any impediments to a marriage between persons not known by the description. It has been held, therefore, from the case of *Early v. Stephens* (a) downwards that a publication in false names is no publication;—to hold otherwise would be contrary to common reason, and to the whole intention of the act.

(a) *Early v. Stephens*, Consistory Court of London, 1785.

There being then a variation in the name here, the question comes whether the variation is sufficient to nullify the marriage. The true Christian name is William Peter ;—in strictness, all baptismal names should be set forth,—for in strictness all compose but one Christian name.—I understand it is so held at common law in a plea of abatement on account of misnomer. In proclamation of banns, therefore, all names should be published ;—for all make but one name, and the party may be known by one to some, by another to others ;—at the same time I should be afraid of going the length of saying the proclamation would be vitiated in all cases by want of this full enumeration ;—where there is no fraud intended on either side,—the mere omission of a dormant name by accident, or negligence,—all parties interested knowing the fact,—and the identity of each of the individuals,—and all circumstances being clear of all purpose of imposition, I think it would be an unreasonable rigour to hold a marriage void for such an omission alone.

But where the omission is known to both,—where it is intended by both as a fraud on a third party,—it is not to be deemed a mere omission ;—but a suppression to avoid the rights of another, and to defraud them. In such a case I think the Court would be called upon to enforce the strict letter of the law, and by so doing to maintain the spirit of it.

It has been argued,—that it is provided in the act that, after the marriage has taken place, the residence shall not be inquired into for the pur-

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pose of annulling the marriage.—This, however, shews that other points may be inquired into for that purpose,—and amongst such points is the publication of banns on which the marriage has taken place.

Thinking, therefore, that the Court is called upon to act on these principles, I have to consider the evidence, in order to see whether it is a casual omission, and not intended to mislead, or if it is a fraudulent suppression in order to effect a marriage which would not otherwise take place.—If one name is dormant, and that is omitted, it seems that it would be no more than a fair presumption that it was accidental,—for where could be the use of omitting an unknown name?—But here the name is omitted by which he was usually known and called in the family;—even by this person in her letters.—This can leave little doubt but that the concealment was intentional, and for the purpose of deceiving the father, or the friends of the family, who might convey the information to him;—and this appears to be a very deciding criterion between the accidental case, and the fraudulent, unless other circumstances of greater weight countervail its effect, and give the transaction, as they possibly may do, a different character: in the present case, it rather appears to the Court that other attending circumstances confirm the impression of fraud which the suppression of the name had already affixed to it.

The banns were actually published, and the marriage celebrated in St. Andrew's, Holborn, the real residence of the father being in Marybone.—

An objection was taken on the admission of the libel which stated these facts, that it was against the provisions of the statute to inquire into the residence in order to annul the marriage on that ground. The answer given that the pleading of this circumstance was not used to invalidate the marriage directly, but only as a support to the charge of fraud, did not entirely satisfy the Court ; —which, however, admitted the libel with some hesitation, reserving to itself the power of further considering the admissibility of any evidence that might be adduced upon that very point. But it rather appears to me, that another circumstance, though of the same kind, which this case presents, is in a less degree liable to the objection. I mean the fact upon which this marriage was not obtained, the attempt to procure a fraudulent publication of banns at Highgate, which proved ineffectual :—for the publication was refused, because the parties could not vouch for their residence in that parish ; —and nothing followed. This, I think, stands more clear of the objection upon which the Court still retains its doubt, whether it could, consistently with the act of parliament, admit any averment that the marriage took place in a parish which was not the parish of the parties, though that averment was introduced only as a proof of fraud,—and not as a ground of nullity,—for here no such marriage followed from that act ;—it stands as a naked attempt of fraud, no consequence following from thence ,—and being such an attempt of fraud, so qualified, hardly comes within the prohibitory

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language of the statute. It will not disturb a marriage effected by its means, but is a substantive attempt of fraud on the part of these persons,—not immediately and directly contributing to the present marriage ;—and as being so,—is more free from the objection to which it would be liable if it were. If so, here is a direct evidence of a fraud auxiliary to the imputation of fraud employed in the immediate transaction.

The probable disparity of years is another subsidiary circumstance ;—the boy is a school boy of sixteen years of age, the age of the other party does not appear ;—but certainly the fair presumption is, that it exceeded that age.

Upon the joint effect of all these circumstances, I think myself justified in pronouncing that the publication containing this omission was fraudulent and false, and that the marriage had thereon is null and void.

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AN  
**I N D E X**  
TO THE  
**PRINCIPAL MATTERS.**

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